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No. 95-1717-CFX

Title: United States, Petitioner  
v.  
David W. Lanier

Docketed:  
April 23, 1996

Court: United States Court of Appeals for  
the Sixth Circuit

Entry Date

Proceedings and Orders

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Apr 22 1996	Petition for writ of certiorari filed. (Response due May 23, 1996)
Apr 22 1996	Appendix of petitioner filed.
May 22 1996	Motion of Southern Poverty Law Center, et al. for leave to file a brief as amici curiae filed.
May 23 1996	Brief of respondent David W. Lanier in opposition filed.
May 23 1996	Motion of respondent for leave to proceed in forma pauperis filed.
May 29 1996	DISTRIBUTED. June 14, 1996
Jun 5 1996	Reply brief of petitioner United States filed.
Jun 17 1996	Motion of Southern Poverty Law Center, et al. for leave to file a brief as amici curiae GRANTED.
Jun 17 1996	Motion of respondent for leave to proceed in forma pauperis GRANTED.
Jun 17 1996	Petition GRANTED.
	SET FOR ARGUMENT January 7, 1997.
	*****
Jul 8 1996	Motion of respondent for appointment of counsel filed.
Jul 24 1996	Order extending time to file brief of petitioner on the merits until August 16, 1996.
Jul 24 1996	DISTRIBUTED. September 30, 1996 (Page 59)
Aug 12 1996	Record filed.
Aug 14 1996	Motion of American Civil Liberties Union, et al. for leave to file a brief as amici curiae filed.
Aug 15 1996	Motion of NOW Legal Defense and Education Fund, et al. for leave to file a brief as amici curiae filed.
Aug 15 1996	Motion of Southern Poverty Law Center, et al. for leave to file a brief as amici curiae filed.
Aug 16 1996	Joint appendix filed.
Aug 16 1996	Brief of petitioner United States filed.
Aug 16 1996	Record filed.
Aug 16 1996	Motion of Vivian Forsythe-Archie, et al. for leave to file a brief as amici curiae filed.
Sep 10 1996	Brief of respondent David W. Lanier filed.
Sep 20 1996	Motion of American Civil Liberties Union, et al. for leave to file a brief as amici curiae GRANTED.
Sep 20 1996	Motion of NOW Legal Defense and Education Fund, et al. for leave to file a brief as amici curiae GRANTED.
Sep 20 1996	Motion of Southern Poverty Law Center, et al. for leave to file a brief as amici curiae GRANTED.
Sep 20 1996	Motion of Vivian Forsythe-Archie, et al. for leave to file a brief as amici curiae GRANTED.
Oct 7 1996	Motion for appointment of counsel GRANTED and it is ordered that Alfred H. Knight, Esquire, of Nashville, Tennessee, is appointed to serve as counsel for the respondent in this case.

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Entry Date

Proceedings and Orders

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Oct 17 1996	Reply brief of petitioner United States filed.
Nov 1 1996	Supplemental brief of respondent David W. Lanier filed.
Nov 20 1996	CIRCULATED.
Jan 3 1997	Supplemental brief of petitioner United States (TBP) filed.
Jan 7 1997	ARGUED.

95-1717

Supreme Court, U. S.

FILED

APR 22 1996

No.

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**In the Supreme Court of the United States**

OCTOBER TERM, 1995

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UNITED STATES OF AMERICA, PETITIONER

v.

DAVID W. LANIER

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

1. Whether, under *Screws v. United States*, 325 U.S. 91 (1945), a defendant may not be convicted under 18 U.S.C. 242 for the willful violation of a right secured by the Due Process Clause of the Fourteenth Amendment unless that right has previously been made specific by a decision of this Court in factually similar circumstances.

2. Whether, for purposes of 18 U.S.C. 242, the right secured by the Due Process Clause of the Fourteenth Amendment to be free from interference with bodily integrity by a sexual assault by a state official acting under color of law has been "made specific," within the meaning of *Screws v. United States*, 325 U.S. 91 (1945).

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**In the Supreme Court of the United States**

OCTOBER TERM, 1995

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No.

UNITED STATES OF AMERICA, PETITIONER

*v.*

DAVID W. LANIER

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*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT*

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**PETITION FOR A WRIT OF CERTIORARI**

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The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

**OPINIONS BELOW**

The panel opinion of the court of appeals (App. 87a-143a)<sup>1</sup> is reported at 33 F.3d 639. The order of the court of appeals vacating the panel opinion and granting rehearing en banc (App. 165a-166a) is reported at 43 F.3d 1033. The en banc opinion of the court of

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<sup>1</sup> "App." refers to the separately bound appendix to this petition, and "C.A. App." refers to the joint appendix filed in the court of appeals.

appeals (App. 1a-86a) is reported at 73 F.3d 1380. The order of the district court denying respondent's motion to dismiss the indictment (App. 144a-156a) is unreported.

### JURISDICTION

The judgment of the en banc court of appeals was entered on January 23, 1996. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Section 1 of the Fourteenth Amendment to the United States Constitution provides, in relevant part, that "[n]o State shall \* \* \* deprive any person of life, liberty, or property, without due process of law."

2. Section 242 of Title 18, United States Code, provides in pertinent part as follows:

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State \* \* \* to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States \* \* \* shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section[,] \* \* \* shall be fined under this title or imprisoned not more than ten years, or both[.]<sup>2</sup>

<sup>2</sup> When respondent was indicted in this case, prior to the 1994 amendments to Section 242, the statute referred to "any inhabitant of" any State, rather than "any person in" any State. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320201(b), 108 Stat. 2113.

### STATEMENT

After a jury trial in the United States District Court for the Western District of Tennessee, respondent was convicted on seven counts (two felony counts and five misdemeanor counts) of willfully depriving a person of rights and privileges protected and secured by the Constitution and laws of the United States, in violation of 18 U.S.C. 242. He was acquitted on four counts charging violations of Section 242. He was sentenced to ten years' imprisonment on each felony count and one year's imprisonment on each misdemeanor count, to be served consecutively, for a total of 25 years' imprisonment, all to be followed by two years' supervised release. He was also fined \$25,000 and ordered to pay the costs of his incarceration. A panel of the court of appeals affirmed the convictions and sentence. On rehearing, the en banc court reversed all the convictions.

1. Between 1989 and 1991, while he was an elected Chancery Court judge for Dyer and Lake Counties, Tennessee, respondent David Lanier sexually assaulted five women in his chambers, during the working day. In each instance, the victim was in respondent's chambers incident to her employment with the court system or to the prospect of such employment; one of the victims also had a child custody matter before respondent. Respondent committed one of the assaults while wearing his judicial robe.

Respondent was the only chancellor and juvenile court judge in the two counties, and all the employees of the two courts held their positions at his pleasure. App. 89a. He is a member of a politically prominent family in the area, and at the relevant times his brother was the local prosecutor. App. 34a, 63a.

a. The two felony counts on which respondent was convicted involved two incidents of forcible oral rape of Vivian Archie. In 1989, respondent presided over Archie's divorce and awarded her custody of her daughter. During the following year, Archie applied for a job at the courthouse, and respondent interviewed her in his chambers. During the meeting, respondent told Archie that her father had recently told him that "she was not a good mother," and that her father "wanted custody of her child." App. 94a. Archie became afraid that respondent was going to take her daughter away from her. Respondent told Archie that he could not talk about the matter because he was the judge who would hear the case. *Ibid.*

Respondent then told Archie that he had promised the job to someone else. Archie responded that she would do anything to get a job, so that she could support her daughter. When she was preparing to leave respondent's chambers, she reached across the desk to shake respondent's hand. Respondent grabbed her hand, pulled her around the end of the desk, grabbed her hair and neck, and tried to fondle and kiss her. Although Archie tried to push him away, respondent threw her into a chair and continued to try to kiss her. He then stood over her, exposed himself, pulled her head down, and squeezed her jaws to make her open her mouth. He forced his penis into her mouth and repeatedly thrust it into her mouth until he ejaculated. Archie did not report the assault to anyone, including her family, because she was afraid that respondent would take custody of her child away from her. App. 94a-95a.

A few weeks later, respondent telephoned Archie's home and left a message that "he had a job for her,"

but that she would have to come by his chambers to get the information. At her mother's insistence, Archie called back. Although Archie repeatedly asked respondent to give her the location of the job interview over the telephone, respondent insisted that Archie return to his chambers for the information. Archie went to his chambers, fearing that, if she did not, respondent would conclude that she had told her parents about the assault and would retaliate. While she was in his chambers, respondent told her about a secretarial position with a friend of his. As they were talking, respondent walked around his desk towards her. She began backing out toward the door, but he slammed the door shut, pulled her hair, and pushed her into a chair. He then exposed himself, and again forced her to open her mouth and perform oral sex, and ejaculated in her mouth. During the assault, Archie was crying, gagging, choking, and having trouble breathing. App. 63a-64a.

As with the first assault, Archie did not report the second incident because she was afraid that respondent would retaliate by taking away her child. When she subsequently met respondent, he asked her "how her family life was going," a remark she interpreted as a threat to take away custody if she reported the assaults. App. 64a.

b. The five misdemeanors involve respondent's sexual assaults on four other women. In 1989, respondent sexually assaulted Sandra Sanders, whom he had hired to supervise the Youth Service Office of the Dyer County Juvenile Court. As part of her job, Sanders was required to attend weekly meetings with respondent in his chambers. During one of those meetings, respondent grabbed and squeezed her breasts. Sanders did not report the incident because

she thought no one would believe her, but she confronted respondent and demanded an apology. Although he apologized, he began complaining about the quality of her work, and eventually he demoted her. App. 91a-92a.

Respondent sexually assaulted Patty Mahoney, his secretary, in his chambers. Respondent hired Mahoney in the fall of 1990; she was recently divorced and had two young children to support. Within a day after she began the job, respondent began to touch her breasts and buttocks. He then became more aggressive, grabbing and squeezing her breasts. Although she confronted him about his behavior, the grabbing and squeezing continued on a daily basis. One day, Mahoney broke down crying, and told respondent that she needed the job and wanted him to leave her alone. He reacted by putting his arms around her, picking her off the floor, and aggressively hugging her. He then slid her down his body and ground his pelvis against her. App. 93a. Mahoney quit the job after only two weeks because "it became clear to [her] that he was not going to leave [her] alone." Tr. 3-472. She did not report the incidents because "the Lanier family was so powerful, she thought that no one would hire her if she reported [his] behavior." App. 93a.

In March, 1991, respondent sexually assaulted another of his secretaries, Sandy Attaway. After her first month of work, respondent began to make sexual remarks to her. He asked Attaway if she were afraid of him; when she responded (falsely) that she was not, he told her that "he was a judge, and everyone should be afraid of him." App. 99a. One day, while wearing his judicial robe in his chambers, he walked behind Attaway, put his arms around her, and "pushed his pelvic area into [her] rear end and began grinding into

[her]" with his erect penis. Tr. 2-224; see App. 99a. Attaway did not quit because she needed the job, but three months later, respondent fired her anyway. He subsequently told her that "they would have gotten along fine if she had liked to have oral sex." *Ibid.*

In the fall of 1991, respondent sexually assaulted Fonda Bandy during a meeting in his chambers concerning her work in implementing parenting classes for parents who lived in public housing and who had children in juvenile court (over which respondent presided). After Bandy made a presentation in his chambers, Lanier put his arms around her, kissed her, firmly pulled her up to him, and fondled her breasts. When she tried to escape, he reached out and put his hand on her crotch. Respondent told Bandy that, if she came back to see him, she would have all the clients she needed. App. 99a-100a.

2. Respondent was indicted on 11 counts of violating 18 U.S.C. 242. The indictment alleged in each count that respondent had willfully subjected his victim "to the deprivation of rights and privileges which are secured and protected by the Constitution, and the laws of the United States, namely, the right not to be deprived of liberty without due process of law, including the right to be free from wil[l]ful[] sexual assault." C.A. App. 25-33.

The trial court explained to the jury that respondent was charged in each count with depriving someone of the right "not to be deprived of liberty without due process of law, specifically [the] right to be free from willful sexual assault." C.A. App. 884. It explained that, included in the rights secured by the Fourteenth Amendment "is the concept of personal bodily integrity and the right to be free of unauthorized and unlawful physical abuse by state

intrusion." *Ibid.* It instructed that the Due Process Clause protects against physical abuse when the conduct "is so demeaning and harmful under all the circumstances as to shock one's consci[ence]." *Ibid.* And it charged the jury that not "every unjustified touching or grabbing by a state official \* \* \* constitutes a violation of a person's constitutional rights. The physical abuse must be of a serious and substantial nature that involves physical force, mental coercion, bodily injury or emotional damage which is shocking to one's consci[ence]." *Id.* at 884-885. Petitioner did not object to those instructions. See Tr. 10-1742 to 10-1752.<sup>3</sup>

The jury returned verdicts of guilty on seven counts, and not guilty on three counts; the court

<sup>3</sup> Before trial, respondent moved to dismiss the indictment, arguing that Section 242 does not give fair notice of the conduct proscribed, and thus is unconstitutionally void for vagueness. That motion did not assert that respondent's alleged conduct did not violate a constitutional right. The trial court denied the motion, noting that this Court had upheld the statute against a vagueness challenge in *Screws v. United States*, 325 U.S. 91 (1945). See App. 145a-147a. The court also stated that, "[a]lthough the issue has not been raised, it is clear that existing law recognizes one's constitutional right to be free of coerced sexual acts such as intercourse or oral sex." App. 146a n.4. After the government rested its trial case, respondent moved for a judgment of acquittal on all counts, arguing, in part, that "no federal crime [had been] proved by the government." Tr. 6-960. That argument was based on the requirement of Section 242 that the action have occurred "under color of law." Respondent stated that, except as to Count 9, he was "not alleging that there has been no deprivation of constitutional rights shown. I am satisfied that a deprivation of freedom on [sic] liberty from sexual assault is adequate." Tr. 6-960; see also Tr. 6-991; App. 103a. The court denied the motion for acquittal. Tr. 6-1000.

dismissed one count.<sup>4</sup> With respect to the two counts involving the assaults on Vivian Archie, the jury found that Archie had suffered "bodily injury" from those assaults, which, under the text of Section 242, made respondent eligible for a maximum term of ten years' imprisonment on those counts. See App. 109a-111a. The court sentenced respondent to a ten-year prison term on each of those counts, and to the maximum one-year prison term available for each of the other counts, for a total term of 25 years' imprisonment. App. 159a.

3. a. A unanimous panel of the court of appeals affirmed the convictions and sentence, App. 87a-143a,<sup>5</sup>

<sup>4</sup> Respondent was found not guilty on Counts 1, 3, and 10, which alleged that he committed another sexual assault against Sandra Sanders, and also sexually assaulted two women not named in the text. C.A. App. 25-26, 32. The court dismissed Count 9, which alleged that respondent sexually assaulted a woman in his chambers, when she was meeting with him about her case, by exposing his genitals and urging her to engage in sexual acts with him. Tr. 10-1738; C.A. App. 31.

<sup>5</sup> Rejecting respondent's contention that he had not deprived his victims of a constitutional right, the panel concluded that "the government established that [respondent] violated the victims' constitutional right; namely, their right to bodily integrity. Further, the right to bodily integrity has been defined and made specific by court decision." App. 104a. "It is settled now," the panel continued, "that the Constitution places limits on a State's right to interfere with a person's . . . bodily integrity." *Ibid.* (quoting *Canedy v. Boardman*, 16 F.3d 183, 185 (7th Cir. 1994) (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 849 (1992))). The panel also rejected respondent's contentions that he had not acted intentionally to deprive his victims of their constitutional rights, and that he had not acted under color of law. App. 106a-109a. With respect to the latter point, the panel noted that "all of the assaults took place in [respondent's] chambers during working hours, \* \* \* during

but on rehearing, a divided en banc court reversed and instructed the district court to dismiss the indictment, App. 1a-86a. The majority opinion (App. 1a-32a) initially framed the question as whether "the sexual harassment and assault of state judicial employees and litigants by the judge violates" Section 242. App. 3a. The majority noted that Section 242 "does not specifically mention or contemplate sex crimes," *ibid.*, and "by its terms criminalizes violations of 'constitutional rights' only in the abstract, not conduct which is specifically described by federal or state statute," App. 4a. It noted "the fundamental principle limiting the judicial power to extend criminal statutes by interpretation," *ibid.*, since, "[n]o matter how outrageous a defendant's actions may be, he has to be charged with the appropriate offense created by criminal law," App. 5a.

After reviewing the legislative history of Section 242,<sup>6</sup> the majority concluded that sexual assault by a state actor is not punishable under that Section as a

each assault there was at least an aura of official authority and power, [and] \* \* \* there was evidence that [respondent] used his position to intimidate his victims into silence." App. 108a.

<sup>6</sup> The opinion concluded that "Congress never deliberately intended to criminalize in § 242 the greatly expanded scope of modern-day constitutional rights even though the literal language of the statute—recodified from a previous civil statute by mistake—is open to that interpretation." App. 16a. Only seven of the court's fifteen judges (fewer than a majority) joined that part of the opinion. Its significance is in any event unclear, since the opinion acknowledged elsewhere that, once this Court has specifically recognized a constitutional right protected by the Due Process Clause, violations of that right may be punished under Section 242. App. 28a-29a. See *United States v. Guest*, 383 U.S. 745, 753 (1966); *United States v. Price*, 383 U.S. 787, 798, 800 (1966).

violation of rights protected by the Due Process Clause. It rejected the government's argument that, for purposes of Section 242, freedom from sexual assault by a state officer is part of an established "constitutional right against interference with 'bodily integrity' in a way that 'shocks the conscience.'" App. 17a.<sup>7</sup> "Conditioning the right on whether the particular acts of a defendant 'shock the conscience' leaves the definition of the crime up in the air, \* \* \* [and] requires [jurors] to make an essentially arbitrary judgment. \* \* \* 'Shocks the conscience' is too indefinite to give notice of a crime" and "will yield results that depend too heavily on factual particularity of an individual set of events and upon biases and opinions of individual jurors." App. 19a-20a.<sup>8</sup>

<sup>7</sup> The government had relied, for that proposition, on *Ingraham v. Wright*, 430 U.S. 651 (1977), lower-court decisions in civil cases decided under 42 U.S.C. 1983, and previous appellate decisions involving prosecutions under Section 242 for the deprivation of constitutional rights through sexual assault. See Gov't En Banc C.A. Br. 7-10. The majority found no support for the government's argument in those decisions, or in *Rochin v. California*, 342 U.S. 165 (1952). See App. 17a-18a.

<sup>8</sup> The court also found support in canons of interpretation of criminal statutes. App. 20a-25a. It emphasized that the legislature (not the judiciary) is the primary lawmaking body, that the rule of lenity requires that ambiguous criminal statutes be construed in favor of the defendant, and that criminal statutes must be strictly construed. App. 21a. "A holding here that [respondent] is criminally liable under federal law" was impermissible, the court stated, because "no language of the statute and no holding of the Supreme Court suggest that [his] behavior constitutes a federal constitutional crime. There has been no notice to the public of such a federal crime. To hold otherwise would violate the Rule of Law." App. 25a.

The court then addressed *Screws v. United States*, 325 U.S. 91 (1945), in which this Court rejected a challenge to Section 242 as void for vagueness. In *Screws*, a plurality of the Court stated that a defendant can know with sufficient definiteness "the range of rights that are constitutional" and therefore protected from violation by Section 242, because it construed Section 242 to require a specific intent to deprive a person of a right that has been "made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them." 325 U.S. at 104.

Based on that language in *Screws*, the majority concluded that "the right not to be assaulted" does not meet the standard of specificity required by *Screws* because "it is not publicly known or understood that this right rises to the level of a 'constitutional right.' It has not been declared as such by the Supreme Court. It is not a right listed in the Constitution, nor is it a well-established right of procedural due process like the right to be tried before being punished." App. 28a.

Although the government argued that the right under the Due Process Clause to be free from sexual assault, and indeed from unjustified brutal official assault generally, was well established by lower-court decisions (see Gov't En Banc C.A. Br. 7-10), the court held that such lower-court decisions are insufficient to provide the notice necessary to support conviction under Section 242:

Only a decision of the Supreme Court establishing the constitutional crime under § 242 can provide such notice. To accept lower court authority would result routinely in making federal

criminal liability under § 242 turn on new crimes recognized only by the circuit or district court where the defendant engaged in the conduct at issue. \* \* \* Only a Supreme Court decision with nationwide application can make specific a right that can result in § 242 liability.

App. 28a-29a.

The majority also read *Screws* to hold that this Court "must not only enunciate the existence of a right, it must also hold that the right applies to a factual situation fundamentally similar to the one at bar"; thus, "[i]f the [Supreme] Court enunciates a right, but leaves some doubt or ambiguity as to whether that right will apply to a particular factual situation, the right has not been 'made specific' as is required under *Screws*." App. 29a-30a. It also remarked that "[t]he 'make specific' standard is substantially higher than the 'clearly established' standard used to judge qualified immunity in section 1983 civil cases." App. 30a. Applying that strict standard, it concluded that "sexual assaults may not be prosecuted as violations of a constitutional substantive due process right to bodily integrity," App. 31a, and it ordered dismissal of the indictment, App. 32a.

b. Judges Wellford and Nelson wrote separate opinions concurring in part and dissenting in part. Both concluded that the conduct underlying the misdemeanor counts did not reach the level of a constitutional violation, but both also concluded that the forcible oral rapes of Vivian Archie did reach that level, and that the rapes could be punished under

Section 242 as violations of a constitutional right that had been made specific. App. 33a-41a, 42a-46a.<sup>9</sup>

c. Judge Daughtrey wrote the principal dissenting opinion. App. 57a-86a.<sup>10</sup> She disagreed with the

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<sup>9</sup> Judge Wellford stated that, "[o]nce a due process right has been defined and made specific by court decisions, that right is encompassed by § 242." App. 37a. He stressed that "the Supreme Court has recognized that persons, especially females, have a constitutional right to bodily integrity." App. 38a (citing *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and *Ingraham v. Wright*, 430 U.S. 651 (1977)). He also noted that lower courts had recognized a right to be free "from physical and sexual assault" in previous civil and criminal cases. App. 38a-39a.

Judge Nelson found the applicability of the statute to be "self-evident," App. 43a, since Vivian Archie was "literally (and humiliatingly) deprived of her liberty while locked in [respondent's] foul embraces. \* \* \* [She] was restrained not only by [respondent's] hands on her throat, but by [his] none-too-subtle suggestion that her daughter would be taken away from her if she resisted," App. 44a. Even though the Supreme Court has not decided explicitly "whether Section 242 criminalizes a deprivation of liberty resulting from lust," he noted that it would be "passing strange" if "judges could acquire by prescription a right to make sex slaves of litigants or prospective litigants." He also remarked that he was "not sure how such a question would ever reach the Supreme Court in the first place." App. 45a.

<sup>10</sup> Judge Daughtrey's dissent was joined in full by Judges Keith and Moore. Judge Keith also wrote a separate dissent (App. 47a-49a), stating that respondent's actions were "more than enough to satisfy the most stringent interpretations for prosecution under § 242" (App. 47a). Judge Jones also dissented (App. 50a-57a) and stated that "court decisions have made specific the right to be free from invasions of bodily integrity that shock the conscience" (App. 51a). Even though this Court "has not held specifically that sexual assault violates the right to bodily integrity," he observed that "a number of

majority's reading of *Screws* as requiring Supreme Court decisions involving similar facts to support a conviction under Section 242. She noted that, in discussing the problem of notice to the defendant, *Screws* adverted to the need for "decisions interpreting [the Constitution]," not only "Supreme Court decisions providing such interpretations," and that *Screws* referred to "the decisions of the courts" as a "source of reference for ascertaining the specific content of the scope of due process." App. 73a-74a. She also stressed that problems of notice to the defendant are absent here, because, even if the Supreme Court had not delivered a decision directly on point, "all federal courts addressing analogous situations have accepted the long-standing existence and viability of a right to freedom from interference with bodily integrity." App. 74a.

"Even more troubling," Judge Daughtrey remarked, was that the majority had "reject[ed] or ignore[d]" Supreme Court decisions recognizing "a constitutional right to bodily integrity." App. 74a (citing *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), *Cruzan v. Missouri Dep't of Health*, 497 U.S. 261 (1990), *Youngberg v. Romeo*, 457 U.S. 307 (1982), and *Ingraham v. Wright*, 430 U.S. 651 (1977)). Although those decisions "do not specifically mention

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ways exist to deprive one of [that] right," and noted that violations of that right have previously been the subject of convictions under Section 242, as well as civil litigation. App. 52a. Such "specific establishment of rights" by the courts, he stated, was sufficient to prevent any danger "that runaway \* \* \* prosecutors will break open the bounds of the statute[.]" \* \* \* Only after [a judicial] decision has been made are prosecutors afforded the opportunity to bring indictments." App. 55a.

sexual assaults upon individuals under color of law, \* \* \* logical interpretations of existing law cannot be ignored by the courts simply because *factually* similar cases are not present[.]” App. 74a-75a. Indeed, Judge Daughtrey noted:

The easiest cases don't even arise. There has never been [, for example,] a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages liability because no previous case had found liability in such circumstances.

*Ibid.* (citation omitted). “Likewise,” she concluded, “this is the ‘easy’ case that demonstrates a blatant violation of those Supreme Court and courts of appeals precedents that have ‘made specific’ the fact that interference with personal security and bodily integrity that shocks the conscience is proscribed by the substantive due process principles of the Fourteenth Amendment.” *Ibid.*

#### REASONS FOR GRANTING THE PETITION

For decades, Section 242 of Title 18, United States Code, has been the primary tool for bringing to justice state officials who engage in the most egregious abuses of official power, including rapes, beatings, and other unjustified assaults. The court of appeals’ decision will sharply, erroneously, and arbitrarily limit such prosecutions. Review by this Court is necessary to ensure that Section 242 will be able to continue to play its central role in the protection of fundamental constitutional rights against clear official abuse.

In *Screws v. United States*, 325 U.S. 91 (1945), the Court addressed concerns arising from the broad language of Section 242, which does not list the constitutional rights that it protects. In rejecting a vagueness challenge to the provision, the Court held that the statute’s element of willfulness requires the government to prove that the defendant had the intent to deprive a person of a right “made specific” by either the express terms of the Constitution or “decisions of the courts” interpreting the Constitution. That standard has not been a difficult one to apply in practice.<sup>11</sup>

The court of appeals has arbitrarily held, however, that a due process right can be “made specific” within the meaning of *Screws* (and thus a deprivation of that right can be punished under Section 242) only if the right has been enunciated in a decision of *this Court* in a *factually similar case*. That decision is contrary to decisions in other circuits, and is not compelled by the reasoning or language of the *Screws* opinion. It also presents a serious practical threat to federal

<sup>11</sup> Approximately 30 cases per year are prosecuted by the Department of Justice under Section 242. Most involve brutal assaults by persons acting under color of law, and many are necessarily based on the Due Process Clause right to bodily integrity, since they arise out of situations where the Fourth and Eighth Amendments do not apply, such as beatings of pretrial detainees. Since 1981, the Civil Rights Division of the Department of Justice has prosecuted at least 29 cases under Section 242 involving sexual assault by public officials; more than half of those cases were brought in the last five years. Typically, the victim in those cases has been a woman who was sexually assaulted by a jailor, police officer, or border patrol agent. Three cases, other than this case, involved sexual assault by state judges; two resulted in guilty pleas, the third in acquittal.

prosecution of civil rights offenses, particularly in cases involving the most egregious abuses of authority, such as rape and other brutal assaults—abuses which, because the deprivation of rights is so clear, ordinarily do not reach this Court.

The court of appeals' erroneous reading of *Screws* led to its conclusion that Section 242 may not be used to punish the deprivation of rights that occurred in this case. A long series of decisions by this Court, and also lower-court decisions, have "made specific," within the meaning of *Screws*, that the Due Process Clause protects a fundamental right to be free from rape and brutal assault by a state officer, using his or her office to commit the crime. Respondent may be punished under Section 242 for violating that right.

1. a. The court of appeals erred in reading *Screws* to hold that the violation of a right protected by the Due Process Clause may not be punished under Section 242 unless that right has been recognized by this Court in a factually similar situation. In *Screws*, the Court explicitly addressed the concern expressed by the court of appeals in this case—that, given the "broad and fluid" definition of due process, a state official could be prosecuted for violating a right that he or she could not have known existed. See 325 U.S. at 95-97. The Court rejected the argument that Section 242 is unconstitutionally vague as applied to due process rights, after holding that the statute's element of willfulness requires proof of intent "to deprive a person of a right which has been made specific either by the express terms of the Constitution or laws of the United States or decisions interpreting

them." *Id.* at 104.<sup>12</sup> Under that construction of Section 242, "the claim that [Section 242] lacks an ascertainable standard of guilt must fail," because the articulation of a constitutional right by the courts gives "fair warning" that an intentional deprivation of that right may be punished. *Id.* at 103-104.

The Court in *Screws* recognized that "*the decisions of the courts* are \* \* \* a source of reference for ascertaining the specific content of the concept of due process." 325 U.S. at 96 (emphasis added). Moreover, the element of willfulness in Section 242 further ensures that "the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits." *Id.* at 102. Thus, the problem of notice is absent because Section 242 requires "a specific intent to deprive a person of a federal right made definite *by decision or other rule of law.*" *Id.* at 103 (emphasis added). And once the due process right has been "made definite by decision," the defendant is "in no position to say that [he] had no adequate advance notice that [his actions] would be visited with punishment." *Id.* at 105.

*Screws* refers to "decisions"; it does not forbid prosecution for a violation of a right protected by the Due Process Clause because a factually similar decision of this Court has not declared that right. Other circuits have recognized that a decision of this Court directly on point is not required by *Screws*. In several cases, they have looked to previous decisions of the courts of appeals, and sometimes also to de-

<sup>12</sup> Although only four Justices joined the plurality opinion in *Screws*, that opinion has been taken in later cases as the decision of the Court. See *United States v. Guest*, 383 U.S. 745, 753-754 (1966); *United States v. Price*, 383 U.S. 787, 793 (1966).

cisions of this Court articulating the same broad constitutional right (but not necessarily on closely similar facts) to conclude that an offense could be punished under Section 242.

For example, in *Lynch v. United States*, 189 F.2d 476, cert. denied, 342 U.S. 831 (1951), the Fifth Circuit concluded that the defendant law enforcement officers could be convicted under Section 242 for "hand[ing] over" blacks who had been arrested to members of the Ku Klux Klan, who then beat the arrested men severely. *Id.* at 478. The court relied on *Screws* (which did not involve "handing over" arrested men to a private mob but, rather, a murderous assault by law enforcement officers themselves), on previous decisions of this Court indicating that "official inaction may also constitute a denial of equal protection," and also on a Fourth Circuit case involving failure to protect victims from group violence. It concluded from those sources that, under Section 242, the defendants could be punished for violating the victims' right to due process, and also equal protection, including "the right of protection due the prisoner by the arresting officers against injury by third persons." *Id.* at 479-480.

Similarly, in *United States v. Stokes*, 506 F.2d 771 (5th Cir. 1975), which involved a prosecution of a police officer for severely beating a man in custody at the police station, the court looked solely to decisions of courts of appeals for "the proposition that one's right to be free from unlawful assault by state law enforcement officers when lawfully in their custody has been made a definite and specific part of the body of due process rights." *Id.* at 775. See also *id.* at 775-776 (relying only on appellate cases under Section 1983 to conclude that due process includes "a right

not to be treated with \* \* \* unprovoked force by those charged by the state with the duty of keeping accused and convicted offenders in custody").

*United States v. Dise*, 763 F.2d 586, cert. denied, 474 U.S. 982 (1985), was a prosecution against an employee of an institution for the mentally disabled for beating inmates with no authorized reason. There, the Third Circuit rejected the defendant's argument that he could not be convicted under Section 242 because the incidents took place before *Youngberg v. Romeo*, 457 U.S. 307 (1982), where this Court considered "for the first time the substantive rights of involuntarily committed mentally retarded persons under the Fourteenth Amendment," *id.* at 314. The court in *Dise* noted that the case involved the federally protected interest in "personal security and freedom from bodily restraint, [which] have always been protected by the due process clause." 763 F.2d at 588. Other courts have also looked to lower-court decisions as well as decisions of this Court to determine whether a right had been made sufficiently definite under *Screws*. See *United States v. Reese*, 2 F.3d 870, 888-889 (9th Cir. 1993), cert. denied, 114 S. Ct. 928 (1994); *United States v. Langer*, 958 F.2d 522, 524 (2d Cir. 1992); *United States v. Hayes*, 589 F.2d 811, 820 (5th Cir.), cert. denied, 444 U.S. 847 (1979).

b. Neither logic nor the reasoning of *Screws* supports the court of appeals' decision. A Supreme Court decision directly on point is not necessary for a conviction under Section 242. The willful violation of a constitutional right may be punished under Section 242 if the lower courts, following principles established by this Court, have recognized that the right is "so rooted in the traditions and conscience of our people as to be ranked as fundamental" (*Screws*, 325

U.S. at 95). It may also be punished if this Court has articulated the content of a fundamental constitutional right in a manner that shows its applicability to the case at hand, even if it has not applied that right in a closely similar fact pattern.

A principal concern of *Screws* is notice to the defendant. The Court there was concerned that Section 242 might be interpreted so that "a local law enforcement officer \* \* \* can be sent to the penitentiary if he does an act which some court later holds deprives a person of due process of law." 325 U.S. at 97. Without a limiting construction of Section 242, "[t]hose who enforce local law today might not know for many months (and meanwhile could not find out) whether what they did deprived someone of due process of law." *Ibid.*

A prior decision of this Court articulating a constitutional right in closely similar factual circumstances is not necessary to ensure adequate notice to defendants under Section 242. When lower-court decisions or the "traditions and conscience of our people" clearly show the existence of a fundamental right, a violation of that right by an official acting under color of law may be punished under Section 242. In such circumstances, the defendant is not forced to guess at the actions that the statute makes criminal, and "he hardly may be heard to say that he knew not what he did." 325 U.S. at 105. This case well illustrates this point; although there is no Supreme Court decision directly on point, forcible rape or sexual assault by a state official, using the authority of his office to coerce his victims, clearly deprives those victims of liberty without due process, as those concepts have been universally interpreted. The same would be true of a brutal beating of a pretrial

detainee by prison guards, or the wanton brutalization of children by a juvenile court judge.

A rule that only a specific decision of this Court can form the basis of a due process right protected from deprivation by Section 242 would lead to perverse results, and would severely impair federal protection of civil rights—especially protection from brutal assaults or rapes by state officials in situations where neither the Fourth Amendment nor the Eighth Amendment would apply. It would lead, for example, to the odd result that a prison guard could be convicted under Section 242 for raping a convicted felon, but not for raping a pretrial detainee, who is not protected by the Eighth Amendment.<sup>13</sup> Under the court of appeals' arbitrary rule, even if every federal court of appeals had recognized, in civil cases, a right under the Due Process Clause to be free from such rapes, that right nevertheless would not have been "made specific" by "decisions of the courts" within the meaning of *Screws*, because of the absence of a Supreme Court decision. But if the lower courts were unanimous in finding a due process violation, review by this Court would be both unnecessary and unlikely. Thus, the most outrageous abuses of authority by state actors would be placed outside the

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<sup>13</sup> Before *Graham v. Connor*, 490 U.S. 386 (1989), all incidents of excessive force by state officials were prosecuted under Section 242 as violations of the Due Process Clause. *Graham* makes clear that excessive force cases involving Fourth Amendment "seizures" must be analyzed under that Amendment's reasonableness standard, and not under a substantive due process approach. Similarly, cases involving excessive force inflicted on convicted prisoners are now prosecuted as violations of the Eighth Amendment. See *Hudson v. McMillian*, 503 U.S. 1 (1992).

reach of Section 242; the federal government could take no action to vindicate the civil rights of those who had suffered the worst depredations, precisely because there was broad consensus that the rights were constitutionally protected. As Judge Nelson pointed out below (App. 45a), it would be "passing strange" if state actors could acquire in that fashion a privilege to deprive persons of their constitutional rights.

2. This Court has clearly recognized, in a variety of contexts, a due process liberty interest to be free from forcible, unjustified intrusions on personal bodily integrity. Over a century ago the Court emphasized that "[n]o right is held more sacred, or is more carefully guarded by common law, than the right of every individual to the possession and control of his own person, free from all restraint and interference of others, unless by clear and unquestionable authority of law." *Union Pacific Ry. v. Botsford*, 141 U.S. 250, 251 (1891). In *Rochin v. California*, 342 U.S. 165 (1952), the Court held that due process was violated by the forcible administration of a "stomach pumping" solution to recover evidence swallowed by an arrestee, and stressed the "general requirement" that "States in their prosecutions respect certain decencies of civilized conduct," *id.* at 173, and avoid "force so brutal and so offensive to human dignity," *id.* at 174. More recently, the Court has made clear that "[a]mong the historic liberties" protected by the Due Process Clause is "a right to be free from \* \* \* unjustified intrusions on personal security." *Ingraham v. Wright*, 430 U.S. 651, 673 (1977). And in *Youngberg v. Romeo*, 457 U.S. 307, 315-316, 324 (1982), the Court reiterated that bodily integrity is protected

as a matter of substantive liberty under the Due Process Clause.

In a closely related context, the Court has made clear that all persons have a liberty interest protected by due process in avoiding "unwanted administration" of medical procedures. See *Washington v. Harper*, 494 U.S. 210, 221-222 (1990); *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 278 (1990). Justice O'Connor, concurring in *Cruzan*, observed that "state incursions into the body [are] repugnant to the interests protected by the Due Process Clause." *Id.* at 287. Justice Stevens, dissenting, similarly emphasized that the "sanctity, and individual privacy, of the human body is obviously fundamental to liberty." *Id.* at 342. And in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the Court again stressed that the Due Process Clause limits the State's right to interfere with bodily integrity. See *id.* at 869 (joint opinion) (stressing "the urgent claims of the woman to retain the ultimate control over her \* \* \* body, claims implicit in the meaning of liberty"). Thus, "[s]hort of attempting to catalogue every possible factual situation involving an intrusion upon personal security or bodily integrity, it is impossible to see how the \* \* \* Court could have more explicitly stated over the years that violations of that precious right cannot be tolerated in a free and civilized society." App. 76a (Daughtrey, J., dissenting).

Following those decisions from this Court, courts of appeals have squarely held that the fundamental due process right to bodily integrity includes the right to be free from rape, sexual assault, and other brutal assaults committed without a legitimate purpose; they have also held that this right was well

established by the time of the incidents in this case. The Fifth Circuit, in *Doe v. Taylor Independent School District*, 15 F.3d 443 (en banc), cert. denied, 115 S. Ct. 70 (1994), held that a teacher's sexual abuse of a student violated the student's due process right to bodily integrity, and stated that it was "crystal clear" that "[n]o reasonable public school official in 1987 would have assumed that he could, with constitutional immunity, sexually molest a minor student." *Id.* at 455.<sup>14</sup> Similarly, the Third Circuit, in *Stoneking v. Bradford Area School District*, 882 F.2d 720 (1989), cert. denied, 493 U.S. 1044 (1990), held that the due process right to be free from sexual assault was clearly established; citing *Ingraham v. Wright*, *supra*, the court stated that, "[s]ince a teacher's sexual molestation of a student could not possibly be deemed an acceptable practice, as some view teacher inflicted corporal punishment, a student's right to be free from such molestation may be viewed as clearly established even before *Ingraham*." *Id.* at 727. Other decisions have also recognized, in numerous contexts, the due process right to be free from wholly unjustified brutality at the hands of state actors. See, e.g., *Webb v. McCullough*, 828 F.2d 1151, 1158 (6th Cir.

<sup>14</sup> The *Doe* court relied, in particular, on *Shillingford v. Holmes*, 634 F.2d 263, 265 (5th Cir. 1981), in which it had held that a police officer's assault on a photographer violated the victim's due process right to free from "state-occasioned damage to a person's bodily integrity," and *Jefferson v. Ysleta Independent School District*, 817 F.2d 303, 305 (5th Cir. 1987) (footnote omitted), where it noted (for qualified immunity purposes) that "it is not necessary to point to a precedent which is factually on all-fours with the case at bar[;] [i]t suffices that the [defendant] be aware of general, well-developed legal principles."

1987) (disciplinary action on school field trip not justifiable as punishment); *Shillingford v. Holmes*, 634 F.2d 263, 265 (5th Cir. 1981) (police officer's assault on photographer); *Gregory v. Thompson*, 500 F.2d 59, 62 (9th Cir. 1974) (justice of the peace who assaulted and beat someone in his courtroom).<sup>15</sup>

There are also several reported cases under Section 242 in which the defendant was convicted of violating a due process right to bodily integrity by sexual assaulting the victim. In *United States v. Contreras*, 950 F.2d 232, 235-236 (5th Cir. 1991), cert. denied, 504 U.S. 941 (1992), a police officer was convicted of violating Section 242 by sexually assaulting a woman he had detained. In *United States v. Davila*, 704 F.2d 749 (5th Cir. 1983), border patrol officers were convicted under Section 242 for coercing sex from two women whom they had detained. And in *United States v. Brummett*, 786 F.2d 720 (6th Cir. 1986), the defendant pled guilty to counts under Sections 241 and 242 in connection with a sexual

<sup>15</sup> See also *Dang Vang v. Vang Xiong X. Toyed*, 944 F.2d 476 (9th Cir. 1991) (assuming existence of clearly established fundamental right to be free from rape at hands of government official, and discussing whether rape was committed under color of law); *Gilson v. Cox*, 711 F. Supp. 354 (E.D. Mich. 1989); *Wedgeworth v. Harris*, 592 F. Supp. 155, 159-160 (W.D. Wis. 1984); *Stacey v. Ford*, 554 F. Supp. 8 (N.D. Ga. 1982). Cases involving corporal punishment of schoolchildren have held, under *Ingraham*, that excessive punishment would violate a student's liberty interest in personal security. See, e.g., *Metzger v. Osbeck*, 841 F.2d 518, 520 (3d Cir. 1988); *Hall v. Tawney*, 621 F.2d 607, 613 (4th Cir. 1980). One appellate decision is arguably to the contrary. In *Skinner v. City of Miami*, 62 F.3d 344 (11th Cir. 1995), a divided court held that severe "hazing" of a firefighter by his fellow firefighters did not violate his constitutional rights.

assault. In those cases there was no dispute that the sexual assaults violated a constitutional right. Those cases surely demonstrate that, as of the date of the incidents in this case, it was already well recognized that respondent's conduct violated the Due Process Clause. Reported cases involving unjustified non-sexual assaults also demonstrate that point. See *United States v. Dise*, 763 F.2d at 588-589; *United States v. Cobb*, 905 F.2d 784, 788 (4th Cir. 1990), cert. denied, 498 U.S. 1049 (1991); *United States v. Tarpley*, 945 F.2d 806 (5th Cir. 1991), cert. denied, 504 U.S. 917 (1992).

A right to be free from forcible rape and other brutal assault by government officials asserting the power of their office has thus been "made specific" by decisions interpreting the Due Process Clause. Whether the proper focus of inquiry is only on this Court's decisions or on those of the lower courts as well, the overwhelming consensus of those decisions establishes that right.<sup>16</sup> It is not dispositive that none of the reported cases involved the precise factual situation presented here, *i.e.*, "a sitting judge, in his chambers, and in some cases, while in his judicial robes, \* \* \* fondling and raping women with business before his court." App. 75a (Daughtrey, J., dissenting). "[L]ogical interpretations of existing law cannot be ignored simply because *factually* similar cases are not presented." *Ibid.* "It is no

<sup>16</sup> Indeed, Congress has enacted legislation based on the assumption that Section 242 punishes sexual assaults. In the Violent Crime Control and Law Enforcement Act of 1994, Congress required enhanced punishment for several crimes in aggravated circumstances, including sexual violence. That enhancement provision applies to violations of Section 242. See Pub. L. No. 103-322, § 320103(b)(3), 108 Stat. 2109.

extension of the criminal statute \* \* \* to find a violation of it in a new method of interference with the right which its words protect. For it is the constitutional right, regardless of the method of interference, which is the subject of the statute and which in precise terms it protects from injury and oppression." *United States v. Classic*, 313 U.S. 299, 324 (1941).

### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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**In the Supreme Court of the United States**

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

*v.*

DAVID W. LANIER

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

**APPENDIX TO  
PETITION FOR A WRIT OF CERTIORARI**

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**APPENDIX A**  
**UNITED STATES COURT OF APPEALS**  
**FOR THE SIXTH CIRCUIT**

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No. 93-5608

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

*v.*

DAVID W. LANIER, DEFENDANT-APPELLANT

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[Filed: Jan. 23, 1996]

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Before: MERRITT, Chief Judge; KEITH, KENNEDY, MARTIN, JONES, WELLFORD, NELSON, RYAN, BOGGS, NORRIS, SUHRHEINRICH, SILER, BATCHELDER, DAUGHTRY, and MOORE, Circuit Judges.

MERRITT, C.J., delivered the opinion of the Court for nine judges, in which KENNEDY, MARTIN, BOGGS, NORRIS, SUHRHEINRICH, and SILER, JJ., concurred in full and in which RYAN and BATCHELDER, JJ., concurred in Parts I and III. WELLFORD (pp. 1394-1397 [33a-41a]), and NELSON (pp. 1397-1399 [42a-46a]), JJ., delivered separate opinions concurring in part and dissenting in part, with Judge WELLFORD also concurring in Judge NELSON's opinion. KEITH (pp. 1399-1400 [47a-49a]), JONES (pp. 1400-1403 [50a-56a]), and DAUGHTREY (pp. 1403-1414 [57a-86a]), JJ., delivered separate dissenting opinions, with Judges KEITH and MOORE concurring in Judge DAUGHTREY's dissenting opinion.

MERRITT, Chief Judge.

### I. The Question Presented

This is a direct criminal appeal by a convicted Tennessee state judge. He raises a question of interpretation about 18 U.S.C. § 242, perhaps the most abstractly worded statute among the more than 700 crimes in the federal criminal code. Section 242 was adopted as a codification of prior law in 1874 during the period of Reconstruction in the aftermath of the Civil War. It criminalizes without any further definition the willful "deprivation of any rights . . . protected by the Constitution" committed by any person under "color of any law."<sup>1</sup> That is the broad

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<sup>1</sup> The evolution of the language of the statute is as follows. In 1874, the crime read:

SEC. 5577. Every person who, under color of any law, statute, ordinance, regulation, or custom, subjects, or causes to be subjected, any inhabitant of any State or Territory to the deprivation of any rights, privileges, or immunities, secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color or race, than are prescribed for the punishment of citizens, shall be punished by a fine of not more than \$1,000, or by imprisonment not more than one year, or by both.

2 Cong.Rec. 828 (1874).

In 1909, it was amended to add the requirement of wilfulness. 43 Cong.Rec. 3599 (1909). In 1988, it was amended so that the penalty provision would contain: "*and if bodily injury results shall be fined under this title or imprisoned not more than ten years, or both.*" 102 Stat. 4396 (1988).

In 1994, after the indictment was returned in this case, § 242 (along with many other criminal statutes) was amended to add the death penalty and other enhanced penalty provisions. The statute now reads as follows (with the new part underlined):

language we must interpret. The specific question before us is whether the sexual harassment and assault of state judicial employees and litigants by the judge violates this federal criminal statute. The statute, as applied in this case, does not specifically mention or contemplate sex crimes, and including sexual misconduct within its coverage stretches its meaning beyond its original purpose. Thus, the fundamental question before us is whether the statute—tied by its language simply to "constitutional rights"—should receive a fixed definition of criminal liability or should be interpreted as evolving or expanding over time to include the abridgement of

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Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any *person* in any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of *such person* being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined *under this title* or imprisoned not more than one year, or both; and if bodily injury results *from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire*, shall be fined *under this title* or imprisoned for not more than ten years, or both; and if death results *from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill*, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.

18 U.S.C.A. § 242 (West 1969 & 1995 Supp.), 108 Stat. 1970-71, 2109, 2113, 2147 (1994).

new constitutional rights as they are recognized in our civil constitutional law. The courts have developed theories or ingredients of constitutional violations primarily in the civil context, and there is no developed law of constitutional crimes. Section 242 by its terms criminalizes violations of "constitutional rights" only in the abstract, not conduct which is described specifically by federal or state statute. The problem here is to articulate as nearly as possible a theory of constitutional crimes consistent both with constitutional rights declared in civil cases and also consistent with established canons of statutory construction of federal criminal laws.

In *Screws v. United States*, the Supreme Court upheld the constitutionality of § 242 by one vote, with the majority unable to agree on a single rationale. 325 U.S. 91 (1945). In a five-four decision, the Court narrowly rejected arguments, accepted by the dissenters, that the statute is too indefinite and vague to meet due process standards. These standards require federal criminal statutes to be written with sufficient definiteness to give notice of the criminal conduct for which a person may be punished in federal court.

In a long line of cases before and after the *Screws* case, the Supreme Court has sought to apply a fundamental principle limiting the judicial power to extend criminal statutes by interpretation, a long-standing principle articulated in 1820 by Chief Justice John Marshall for a unanimous Court:

The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself . . . . It is the legislature, not the court, which is to define a crime, and ordain its punishment . . . . It would be dangerous, indeed, to

carry the principle, that a case which is within the reason or mischief of a statute is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated.

*United States v. Wiltberger*, 18 U.S. 76, 93-94, 5 Wheat. 35, 43-44, 5 L.Ed. 37 (1820). This case stands for a number of fundamental propositions that form the basis of our criminal law, in addition to the principle of strict construction. No matter how outrageous a defendant's actions may be, he has to be charged with the appropriate offense created by federal law. Courts may not create or extend criminal law by using a common-law process of interpretation. If Congress has not been clear about the type of conduct that it wishes to criminalize, courts should not hold a defendant criminally liable by creating a new federal crime.

More recently, Justice Thurgood Marshall observed that reasons of federalism, as well as the necessity of public notice and fair warning, underlie this principle of interpretation:

[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States.

*United States v. Bass*, 404 U.S. 336, 349, 92 S.Ct. 515, 523, 30 L.Ed.2d 488 (1971).

In this case, the defendant, a state Chancery Court judge from a rural county in West Tennessee, was indicted in eleven counts, three of which were felony

counts. The three felony counts charged him with instances of willfully "coercing" a woman "to engage in sexual acts" with him which caused bodily injury (counts 6, 7 and 10). Eight of the counts were misdemeanor counts charging him with various types of "willful sexual assault" by "touching," "grabbing the breasts and buttocks of" or "exposing his genitals to" a woman. The three felony counts charging coercive sexual acts involved two women, and the other eight misdemeanor counts involved six other women. In each count, the constitutional deprivation is described in abstract terms as "the right not to be deprived of liberty without due process of law" under the Fourteenth Amendment. The government alleges that in each instance the defendant acted "under color of law" by using his official position as a Chancellor to engage in the "willful sexual assault."

The District Court overruled the defendant's motion to dismiss the indictment for failure to state a crime under § 242. Seeking to narrow the potential reach of the statute in sex crime cases, it charged the jury that "it is not . . . every unjustified touching or grabbing" that constitutes a constitutional violation, only "physical abuse . . . of a serious and substantial nature . . . *which is shocking to one's conscious* [sic]" (emphasis added). The jury convicted the defendant of two of the three felony counts and five of the eight misdemeanor counts, for which the District Court sentenced him to a total of twenty-five years imprisonment. He has appealed on numerous grounds, including the failure of the District Court to dismiss the indictment for failure to state a federal crime under § 242.

After consideration of the legislative history of this statute, the case law, the long established tradition of

judicial restraint in the extension of criminal statutes, and the lack of any notice to the public that this ambiguous criminal statute includes simple or sexual assault crimes within its coverage, we conclude that the sexual harassment and assault indictment brought under § 242 should have been dismissed by the District Court upon motion of the defendant. Thus the conviction and sentence of the defendant is reversed and the indictment dismissed.

In asserting that sexual assault is a constitutional crime, the prosecution proposes that this substantive due process, sexual assault offense be defined as "interference with bodily integrity that shocks the conscience of the court and the jury." The prosecution relies exclusively on this theory. It has neither articulated nor proposed the recognition of a gender-based crime for sexual assault involving discrimination against or oppression of women in violation of the Equal Protection Clause. Nor did the prosecution allege in the indictment, or attempt to prove as an element of the offense, that the state criminal process in Tennessee was incapable of enforcing its own criminal statutes prohibiting sexual assault, nor did the prosecution allege as an element of the § 242 offense that state law enforcement officials have laws, customs, policies or practices that discriminate against or oppress women as a class. There is no claim that state law enforcement officials and state prosecutors, judges or jurors are any less concerned about such crimes than their federal counterparts. Therefore, our opinion addresses only the substantive due process, "shock-the-conscience" crime alleged by the prosecution, not a crime based on equal protection, state-sanctioned abuse, or some other legal theory.

## II. The Legislative History of § 242

Section 242 is an unusual statute, perhaps unique in our legislative history. Scholars and judges frequently question how much emphasis or reliance one should attempt to put on "legislative intent" derived from studying legislative history. Although it is problematic to presume that any deliberative assembly comprised of many legislators will have one cohesive, coherent and decisive "intent" when it passes such an ambiguous statute, or that judges will be able to discern it, *see* Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 872 (1930), we continue to find it useful to examine the legislative history to confirm or exclude certain interpretations of a statute like the one now before us.

Section 242 was adopted in 1874 as a part of a codification of federal statutes. It attempted to merge three previous sections that had been adopted as part of the 1866 and 1870 Civil Rights Acts and the 1871 Ku Klux Act. In 1909, the Congress added the word "willfully" to the statute. Those legislative acts created the basic language of the statute.

It turns out that the broad language of the 1874 statute, and hence the present language of § 242, arose as a result of a misunderstanding or a confusion in codifying the 1866, 1870 and 1871 Acts. In 1870, Congress commissioned a one-volume compilation of all federal statutes because the sixteen disparate volumes then in existence were too cumbersome. It hired a codifier, Mr. Durant, to redraft and codify the laws of the United States. He decided to fuse the three statutes from 1866, 1870, and 1871 into one new statute that became § 242. Although in codifying the law he was charged with making no substantive

changes, in fact, the one new statute that is now § 242 dramatically expanded criminal liability for civil rights violations if given a literal interpretation and created a new crime that had not previously existed. Congress adopted the new compilation of laws apparently without realizing that any substantive change had been made or that a new, undelineated set of evolving constitutional crimes might be implied from the statute in the future.

On the floor of the House of Representatives, Congressman Lawrence read the three existing sections from the three earlier Acts into the record to illustrate that the new statute Durant proposed, which was to become § 242, changed nothing. But none of the three previous statutes criminalized deprivations of all constitutional rights made under color of law. The 1866 statute—which at the time of enactment was arguably unconstitutional because passed prior to the adoption of the Fourteenth Amendment—criminalized interference under color of law with certain enumerated rights, most notably, contract and property rights and equal protection of the laws.<sup>2</sup>

<sup>2</sup> The Act read as follows:

That all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race or color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State or Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of the person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to

By 1870, the Fourteenth Amendment had been adopted, and Congress in the 1870 Civil Rights Act passed another statute under the authority of the new Amendment that performed the same basic function as the 1866 Act.<sup>3</sup> Finally, Congressman Lawrence

none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

Sec. 2. *And be it further enacted*, That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause or be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishments, pains or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.

2 Cong.Rec. 827 (1874) (citing 14 Stat. 27 (1866)) (emphasis added).

<sup>3</sup> The relevant portions of the 1870 Act read by Congressman Lawrence were:

Sec. 16. *And be it further enacted*, That all persons within the jurisdiction of the United States shall have the same right in every State or Territory of the United States to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding . . . .

Sec. 17. *And be it further enacted*, That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of

mistakenly cited—based on the fact that Durant had mistakenly included—a portion of the 1871 Ku Klux Act as the third predecessor *criminal* statute incorporated in the new condensed criminal statute. That statute provided only for a *civil* remedy for violations under color of law of any constitutional rights. It was the civil predecessor of § 1983.<sup>4</sup> Durant in his codification continued *civil* liability for the violation of all constitutional rights—a rendition true to the 1871 Act—but he then created what is essentially a *parallel criminal statute* that covered violations of all

any State or Territory to the deprivation of any right secured or protected by the last preceding section of this act, or to different punishment, pains, or penalties on account of such person being an alien, or by reason of his color, or race, than is prescribed for the punishment of citizens, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding \$1,000, or imprisonment not exceeding one year, or both, in the discretion of the court.

*Id.* at 827-28 (citing 16 Stat. 144 (1870)) (emphasis added).

<sup>4</sup> [S]ection 1 . . . That any person who under color of any law . . . of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, *shall . . . be liable to the party injured, in any action at law, suit in equity, or other proper proceeding for redress . . . .*

*Id.* at 828 (citing 17 Stat. 13 (1871)) (emphasis added).

The Ku Klux Act provided for both civil and criminal liability. Section 1, however, was purely civil, and provided an action for individuals to get either damages or injunctions against those who deprived them of their civil rights. The criminal provision of the 1871 Act is Section 2, which is the predecessor of current § 241. The compiler mistakenly used language from the civil section of the 1871 Act and created a statute like the civil statute, tied simply to “constitutional rights” and not limited to any specific conduct.

constitutional and federal statutory rights under color of law. Previously, one could only be held criminally liable if one acted under color of law and violated contract, property or equal protection rights.<sup>5</sup> But the new statute codified by Durant *criminalized* violations of all constitutional rights and all rights protected under federal statutory laws. In effect, the recodification grafted the much broader scope for civil liability onto the criminal statute.

Congressman Lawrence explained that the compilation in the "civil rights" area might have resulted in some minor "misconstruction" and errors "bordering on [new] legislation," but that the process was still "valuable in securing uniformity." Congressman Lawrence's remarks provide only the most oblique reference to the large expansion in the criminal law that the codification had in fact created:

In the revision of seventeen volumes there will undoubtedly be not only erroneous punctuation but some omissions of provisions of laws in force; *some misconstruction of statutes carried into the new phraseology adopted*; some provisions of laws put down as in force which may have been repealed, and some other errors occur which will escape all the care, vigilance, and scrutiny that have been or can be given to the revision . . . .

<sup>5</sup> Another portion of the Ku Klux Act of 1871 provided for criminal penalties for conspiracies to violate constitutional rights, and became the basis for the modern day 18 U.S.C. § 241. This act was directed primarily at the Ku Klux Klan, and did not include the requirement that the violation occur under color of law. It criminalizes a conspiracy in which "two or more persons . . . go in disguise upon the public highway" to hinder the exercise of a constitutional right. 18 U.S.C. § 241 (1988).

. . . .

The plan adopted is to collate in one title of "civil rights" the statutes which declare them, which point out the remedies to be pursued, in the manner required in judiciary and procedure statutes; and to insert under the title of "crimes" and under the subdivision chapter of "crimes against the elective franchise and civil rights" the penal provisions of the civil rights acts.

. . . .

A reference to this will indicate the manner in which the purposes of the several civil-rights statutes have been translated into the compiler, *and possibly may show verbal modifications bordering on legislation.*

[The Congressman then read from the Civil Rights Act of 1866 and 1870, the Fourteenth Amendment, and the 1871 Ku Klux Act, and continued:]

Mr. Durant, in his Revision of General Laws, . . . condenses into one the three *criminal* sections I have cited from the acts . . . .<sup>6</sup>

While the three acts contain each a *criminal* section differing in words each from the other, and each section covering some crimes perhaps not covered by either of the others, the one consolidated section of Durant is made applicable

<sup>6</sup> This is a serious mistake. The section quoted from the 1871 Act was civil only, and it was the broad language of the civil statute that was adopted as § 242.

to the violations of rights alike in the three acts. It requires great care to compare and examine the effect of all this, *and it is possible that the new consolidated section may operate differently from the three original sections in a very few cases. But the change, if any, cannot be objectionable, but is valuable as securing uniformity.*

2 Cong. Rec. 827-28 (1874) (emphasis added).

Contrary to the reference by Congressman Lawrence to possible "errors," "misconstruction" and minor changes "bordering on legislation," the Congressional leaders in both the House and the Senate flatly stated that the Durant codification would result in no changes to the laws. In the House, Congressman Poland, the manager of the bill, stated, "we purpose to present the law, when we have gone over it, as a reflex of existing statutes in force on the first day of this session [Dec. 1, 1873]."<sup>7</sup> Likewise, on

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<sup>7</sup> The following passages are excerpts of Congressman Poland's statements to the House assuring other representatives that the recodification would not change the law.

Mr. Wood: If the gentleman from Vermont would permit me, I would like to ask him a question.

....

It is, whether there will be anything in this revision of the laws that we have not already in the Statutes at Large?

Mr. Poland: Nothing; At least we do not intend there shall be.

2 Cong. Rec. 129 (1873).

Later, Mr. Poland again made it clear that no substantive changes were intended:

the Senate floor during the course of a very short discussion of the new codification, Senator Conkling attempted to assure his colleagues that the revision did not represent a change in the law, but added the caveat—which turns out to be an understatement—that he had "no expectation that this work is free from error." 2 Cong. Rec. 4284 (1874).

Accordingly, we can only conclude that, although members of Congress may have realized that in passing a large recodification of the existing body of federal law they might unwittingly be changing something, they had no actual knowledge that they were expanding criminal liability to cover violations of rights beyond certain enumerated rights, primarily those of contract, property, and equal protection. Congress does not evidence in § 242 a deliberate intent to create an evolving criminal law which expands to include new constitutional rights as they become a part of our civil constitutional law. Certainly Congress evidences no intent to make sexual or simple assault a constitutional crime under § 242. Previously, Congress had provided liability for constitutional rights generally only by providing for civil liability.

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Mr. Poland: As I have already said, the commissioners have made some changes in the law, as they were authorized to do under the law. Mr. Durant [the compiler] was employed by the sub-committee of the House . . . to go over this work and strike out everything in the nature of a change of the law. We purpose to present the law, when we have gone over it, as a reflex of existing statutes in force on the first day of this session [Dec. 1, 1873].

2 Cong. Rec. 648 (1874).

Since 1874, Congress has not addressed the scope of the rights to be covered by the abstract language of § 242. The Supreme Court has once in passing recognized that “[t]he substantial change thus effected [to § 242] was made with the customary stout assertions of the codifiers that they had merely clarified and reorganized without changing substance.” *United States v. Price*, 383 U.S. 787, 803, 86 S.Ct. 1152, 1161, 16 L.Ed.2d 267 (1966). This neglected and confused episode in the early history of civil rights legislation indicates that the 1874 Congress never deliberately intended to criminalize in § 242 the greatly expanded scope of modern-day constitutional rights even though the literal language of the statute—recodified from a previous civil statute by mistake—is open to that interpretation. Thus our reading of the legislative record does not support the extension of the abstract language of § 242 to cover all newly-created constitutional rights. Congress has deliberately provided only federal civil liability in such cases.

### III. ANALYSIS

#### A. Case Law on Sexual Assault as a Constitutional Crime

Government counsel in their briefs and at oral argument recognized that in order to sustain the indictment here they must more specifically define the theory behind the “constitutional right” that has been “deprived” under § 242. They recognize that it would not be sufficient simply to point to bad behavior by a state employee or official criminalized under state law. They also recognize that assault and battery and rape are state law crimes and that the Supreme Court has not held or implied that simple or sexual assault by state officials constitutes a consti-

tutional tort under § 1983 or a constitutional crime under § 242.

Counsel argue at an extremely high level of generality. They assert that the constitutional right at issue is one of substantive due process. Their constitutional argument is that “freedom from sexual assault” is a part of a general constitutional right against interference with “bodily integrity” in a way that “shocks the conscience.” They construct a constitutional right against sexual assault from language taken from two cases, *Ingraham v. Wright*, 430 U.S. 651 (1977), and *Rochin v. California*, 342 U.S. 165 (1952).

Counsel, like our dissenting colleagues, do not cite a Supreme Court opinion enforcing such a right. Instead, counsel construct the right from language in *Ingraham*, in which the Court said that schools must afford rudimentary procedural due process to children before paddling them but that such punishment is not subject to the Eighth Amendment. 430 U.S. at 671. In dicta, the Court mentioned that the Due Process Clause protects a person from “unjustified intrusions on personal security.” *Ingraham*, 430 U.S. at 673.

To bolster their constitutional theory, government counsel then cite several lower court decisions in civil cases decided under § 1983. These are civil cases which created a general constitutional right to be free from sexual harassment and coercion. All of these civil decisions, rather than pointing to precedent establishing the right, make assertions such as: “surely the Constitution protects a schoolchild from physical sexual abuse . . . by a public schoolteacher,” *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 451 (5th Cir. 1994) (en banc); or “the notion that individuals have a fundamental substantive due process right to

bodily integrity is beyond debate," *Walton v. Alexander*, 44 F.3d 1297, 1306 (5th Cir. 1995) (Parker, J., concurring). These broad statements are not supported by precedent indicating that a general constitutional right to be free from sexual assault is part of a more abstract general right to "bodily integrity."

The prosecutors cite only one criminal case in which a lower court affirmed a § 242 conviction involving the deprivation of constitutional rights through sexual assault. In *United States v. Davila*, two border patrol officers conditioned entry into the United States upon receipt of sexual favors. 704 F.2d 749 (5th Cir. 1983). In that case, the defendants did not challenge the extension of § 242 to sex crimes. The opinion addresses only evidentiary and other procedural issues. The *Davila* case does not decide or address the issue before us.

In *Cruzan v. Missouri Department of Health*, 497 U.S. 261 (1990), and *Planned Parenthood v. Casey*, \_\_\_ U.S. \_\_\_, 112 S. Ct. 2791 (1992), neither of which are cited by government counsel, the Court mentions "bodily integrity" as a significant value. *Cruzan* discussed bodily integrity in the context of an individual's decision to terminate life support. Similarly, in *Casey*, the Court recognized that the right to an abortion was related to "bodily integrity." Neither case dealt with an assault, and neither supports the Government's contention that the state right to be free from rape and sexual assault and harassment has also been recognized by the Supreme Court generally as a component of an enforceable general constitutional right to "bodily integrity."

The fact that government counsel find it necessary to limit the general constitutional right of "freedom

from sexual assault" to conduct that "shocks the conscience" illustrates the weakness of their constitutional theory. In line with this theory, the district court below instructed the jury to convict the defendant only if the sexual assaults in this case were so severe that they "shock the conscience" of the jury.

Conditioning the right on whether the particular acts of a defendant "shock the conscience" leaves the definition of the crime up in the air.<sup>8</sup> The "shocks the conscience" language comes from *Rochin*, a case holding that pumping a suspect's stomach for drugs "shocked the conscience" and therefore violated his due process rights. 342 U.S. at 172. But the Court intended the standard to be one of law, to be interpreted and applied by judges, not an element of a criminal offense. *Id.* at 170. When a jury is asked to make a factual determination of whether a particular act "shocks the conscience," the instruction requires them to make an essentially arbitrary judgment. "Shocks the conscience" is too indefinite to give notice of a crime. The language as applied in different cases will yield results that depend too heavily on factual particularity of an individual set of events and upon biases and opinions of individual jurors. Counsel for the defendant observes in his en banc brief that

<sup>8</sup> The dissenting opinions of Judges Wellford and Nelson also note the difficulty of applying this amorphous standard, but their solution is to concur in dismissing only the five misdemeanor counts. This solution is incommensurate with the problem because they fail to follow their own rationale by applying it to the two felony counts as well. They fail to recognize that the legislative choice in labelling sexual misconduct a misdemeanor instead of a felony provides no coherent principle for deciding whether conduct in question is a constitutional crime under § 242.

the consequences of adopting such an argument generally to extend § 242 to sex crimes leaves the statute open-ended:

The Congressional intent to punish corruptions and distortions of a lawful state process by state officials will be displaced by a judicially-created rule of criminal liability, applicable to physical assaults committed by state officials which a particular jury finds "shocking." Such a drastic expansion of this criminal statute is not only a judicial encroachment upon legislative authority, it is also an unwarranted encroachment of federal law enforcement authority into the ambit of state law enforcement.

Further Supplement to Defendant's En Banc Brief at 5, *United States v. Lanier* (No. 93-5608) (May 5, 1995).

#### **B. Canons of Interpretation of Criminal Statutes**

In *Connally v. General Construction Co.*, the Court said that "the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties . . . ." 269 U.S. 385, 391 (1926). This language from *Connally* follows the three general canons that govern judicial construction of criminal statutes set out 175 years ago by Chief Justice Marshall in *United States v. Wiltberger*, 18 U.S. 76, 93, 56 Wheat. 35, 43, 5 L.Ed. 37 (1820), quoted earlier: (1) the legislature, not the judiciary, is the primary lawmaking body in the field of federal criminal law and must give the courts something definite to construe; (2) the "rule of lenity" provides that ambiguous criminal statutes should be construed in favor of the defendant; (3) the corollary

that criminal statutes are normally strictly construed by the courts.

Chief Justice Marshall held that Congress has the sole responsibility to draft criminal statutes. It is the only branch of government with the authority to create new crimes. As he observed, "the power of punishment is vested in the legislature, not the judicial department. It is the legislature, not the court, which is to define a crime and ordain its punishment." 18 U.S. at 93. This is an articulation of a basic principle of the separation of powers, as well as due process. The theory is that behavior should only be criminalized if the democratic will so ordains. Unelected judges do not have the authority to enact new criminal laws.<sup>9</sup>

The Supreme Court has explicitly asserted this principle on a number of occasions. In *Bowie v. City of Columbia*, the Court reversed a conviction sustained by the South Carolina Supreme Court. 378

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<sup>9</sup> None of the dissenting opinions even mentions the basic point that unelected judges do not have the authority to enact new criminal laws or expand old ones to include new crimes. They do not recognize that each day at all levels of government, legislators, judges, administrators, prosecutors, police officers, school teachers and coaches, public health and hospital doctors, nurses and employees, military officers, tax collectors and many others interfere, sometimes unreasonably (often arguably maliciously and "shockingly"), with the property rights, personal liberty and bodily integrity of individuals in our society. The open-ended expansion of criminal liability under § 242 by our dissenting colleagues to include any sort of deprivation of a liberty or property interest, or bodily integrity, would presumably turn each such wrong by one of these millions of public actors into a federal constitutional crime. Any rational discussion of the issue must come to grips with this problem.

U.S. 347 (1964). The state courts had convicted protestors of a criminal trespass under a novel interpretation of a state trespass statute. The court decision had the effect of creating a new crime. In *Bouie*, the Supreme Court condemned the attempt to use a judicial construction to achieve an "ex post facto effect" and concluded that such an extension of a criminal statute violated *Wiltberger*. *Id.* at 362.<sup>10</sup> See

<sup>10</sup> The *Bouie* opinion concludes as follows:

We think it clear that the South Carolina Supreme Court, in applying its new construction of the statute to affirm these convictions, has deprived petitioners of rights guaranteed to them by the Due Process Clause. If South Carolina had applied to this case its new statute prohibiting the act of remaining on the premises of another after being asked to leave, the constitutional proscription of *ex post facto* laws would clearly invalidate the convictions. The Due Process Clause compels the same result here, where the State has sought to achieve precisely the same effect by judicial construction of the statute. While such a construction is of course valid for the future, it may not be applied retroactively, any more than a legislative enactment may be, to impose criminal penalties for conduct committed at a time when it was not fairly stated to be criminal . . . .

In the last analysis the case is controlled, we think, by the principle which Chief Justice Marshall stated for the Court in *United States v. Wiltberger*, 5 Wheat. 76, 96:

"The case must be a strong one indeed, which would justify a Court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in

also *Crandon v. United States*, 494 U.S. 152, 158 (1990) ("legislatures, not courts, define criminal liability").

Similarly, turning assault and battery into a constitutional crime would violate the *Wiltberger-Bouie* principle by judicially creating a new crime under § 242. To do so would subject the defendant to the "ex post facto effect" rejected in *Bouie*.

In *Wiltberger*, Chief Justice Marshall also relied on the rule of lenity which mandates that in the case of an ambiguous criminal statute, the ambiguity should be resolved in favor of the defendant. The underlying reason for the rule is that the judiciary should not criminalize behavior that Congress may or may not have intended to prohibit by federal law, particularly when the conduct violates state law and comes within a traditional area of state police power. Of course, courts should not go to extreme lengths to characterize criminal statutes as ambiguous when they can be read as relatively well-defined. The courts should adopt a construction that gives a defendant the benefit of ambiguities, if any, but which also gives effect to the attempts of legislatures to address a particular problem. As Marshall wrote in 1820, "where there is

the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated . . . ."

The crime for which these petitioners stand convicted was "not enumerated in the statute" at the time of their conduct. It follows that they have been deprived of liberty and property without due process of law in contravention of the Fourteenth Amendment.

no ambiguity in the words, there is no room for construction," *Wiltberger*, 18 U.S. at 95-96.

The final and most general principle enunciated in *Wiltberger*—that criminal statutes normally should be construed strictly—can be traced back to *Heydon's Case*, 76 Eng. Rep. 637 (1584), in which Chief Justice Coke referred to the principle to limit the reach of a broad statute.<sup>11</sup> In *Wiltberger*, Chief Justice Marshall wrote that

the rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals . . . . To determine that a case is within the intention of the statute, its language must authorize us to say so.

18 U.S. at 95-96. In addition, Chief Justice Marshall said in language equally applicable to the case before us:

It would be dangerous, indeed, to carry the principle that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated.

*Id.* at 96.

Since *Wiltberger*, the Supreme Court, and the federal courts generally, have repeatedly reaffirmed this canon of construction. *Commissioner v. Acker*,

<sup>11</sup> For a discussion of the historical development of this canon, see Max Radin, *A Short Way With Statutes*, 56 HARV. L. REV. 388, 389 (1942).

361 U.S. 87, 91 (1959) ("The law is settled that 'penal statutes are to be strictly construed.'" (citations omitted)). The *Wiltberger* language is frequently quoted, see *Moskal v. United States*, 498 U.S. 103, 132 (1990) ("The temptation to stretch the law to fit the evil is an ancient one, and it must be resisted.") (Scalia, J., dissenting).

A holding here that the defendant is criminally liable under federal law would succumb to the temptation that Chief Justice Marshall warned against. The law would be punishing the defendant for committing a series of repugnant acts that may be of "equal atrocity, or kindred character" with crimes punishable under the statute, but no language of the statute and no holding of the Supreme Court suggest that such behavior constitutes a federal constitutional crime. There has been no notice to the public of such a federal crime. To hold otherwise would violate the Rule of Law as it has developed in criminal cases from the time of Chief Justice Marshall.

### C. The *Screws* Case Interpreted

*Screws v. United States*, 325 U.S. 91 (1945), as the three dissenters (Justices Jackson, Frankfurter, and Roberts) in that case repeatedly pointed out, diverges in part from these well established canons of construction of criminal law:

It was settled early in our history that prosecutions in the federal courts could not be founded on any undefined body of so-called common law. *United States v. Hudson*, 7 Cranch 32; *United States v. Gooding*, 12 Wheat. 460. Federal prosecutions must be founded on delineation by Congress of what is made criminal. To base federal prosecutions on the shifting and indeter-

minate decisions of courts is to sanction prosecutions for crimes based on definitions made by courts. This is tantamount to creating a new body of federal criminal common law.

It cannot be too often emphasized that as basic a difference as any between our notions of law and those of legal systems not founded on Anglo-American conceptions of liberty is that crimes must be defined by the legislature.

*Id.* at 152 (citation omitted).

Although the majority sought to minimize the deviation from precedent, *Screws* is the only Supreme Court case in our legal history in which a majority of the Court seems willing to create a common law crime. (Justice Douglas wrote a plurality opinion in which Chief Justice Stone and Justices Black and Reed concurred while Justice Rutledge concurred separately.) In *Screws*, a Georgia sheriff and two other officers arrested a black man and brutally executed him without a trial or a hearing. The plurality opinion by Justice Douglas upheld the indictment under § 242 because they believed that (1) it fit within the specific original purpose of the act, *i.e.*, "in origin it was an antidiscrimination measure (as its language indicated), framed to protect Negroes in their newly won rights," *id.* at 98, and (2) the wrongful conduct fit within the specific original purpose of the right of procedural due process going back to the Magna Charta, *i.e.*, that punishment may not be imposed prior to a trial:

It is plain that basic to the concept of due process of law in a criminal case is a trial—a trial in a court of law, not a "trial by ordeal." . . . . Those

who decide to take the law into their own hands and act as prosecutor, jury, judge, and executioner plainly act to deprive a prisoner of the trial which due process of law guarantees him.

*Id.* at 106 (citation omitted). Throughout the opinion, the plurality refers to the wrong as racial discrimination in depriving the decedent of the classic constitutional "right to be tried by a court rather than by ordeal." *Id.* at 107.

In *Screws*, the plurality opinion expressly observed that the Court believed that it was pushed to the difficult choice between declaring § 242 unconstitutional and adopting a "saving construction" that would greatly narrow the statute to the deprivation of obvious, well-established and publicly known constitutional rights. ("Only if no construction can save the Act . . . are we willing to reach that result.") *Id.* at 100. Justice Douglas expressed the view that the plurality wanted to "save" the statute by limiting it to constitutional rights that any reasonable person should know about. The plurality called its construction a "narrow construction" that preserves the principle of strict construction of criminal statutes, and "so construed has a narrower range in all its applications than if it were interpreted in the manner urged by the government." *Id.* at 105. This saving construction held that a criminal defendant could receive the required notice that a constitutional right existed (and therefore that its breach was a crime) from "the express terms of the Constitution or laws of the United States or by decisions interpreting them." *Id.* at 104. It is this phrase, which includes rights enunciated by "decisions," that makes *Screws* unique among criminal law precedents. It is

clear, however, that the *Screws* exception to the *Wiltberger-Connally-Bowie* principles must be confined (1) to cases under § 242 in which the constitutional right "deprived" is specifically stated in the Constitution itself (e.g., unconstitutional searches or seizures) and understood by the literate public to be a well-settled constitutional right, and (2) to well-established procedural due process rights like the right to be tried before being punished by law enforcement officers.

The right deprived in the instant case—the right not to be assaulted—is a clear right under state law known to every reasonable person. The defendant certainly knew his conduct violated the law. But it is not publicly known or understood that this right rises to the level of a "constitutional right." It has not been declared as such by the Supreme Court. It is not a right listed in the Constitution, nor is it a well-established right of procedural due process like the right to be tried before being punished.

Lower court decisions are not sufficient to establish and make definite a particular constitutional crime so as to provide the constitutionally-required notice necessary to support an indictment under § 242. Only a decision of the Supreme Court establishing the constitutional crime under § 242 can provide such notice. To accept lower court authority would result routinely in making federal criminal liability under § 242 turn on new crimes recognized only by the circuit or district court where the defendant engaged in the conduct at issue. A crime recognized in the Sixth Circuit but not in the Eighth Circuit would mean that felonious conduct criminalized in Memphis would not be a federal crime across the river in Arkansas. Only a Supreme Court de-

cision with nationwide application can identify and make specific a right that can result in § 242 liability. Although a rule permitting the Supreme Court to create a new crime obliquely in this way is an exception to the *Wiltberger-Bowie* canons, *Screws* does contain language that creates a narrow exception under § 242.

*Screws* limits the reach of § 242 to cases in which the Supreme Court itself for the nation as a whole has made a particular constitutional right sufficiently clear that a violation of that right constitutes a crime as well as a civil wrong. Moreover, in both cases since *Screws* in which it has addressed the scope of § 242, the Supreme Court has cited one of its own precedents as clearly enunciating the constitutional right violated. See *United States v. Price*, 383 U.S. 787, 793 (1966) (citing *Screws*); *Williams v. United States*, 341 U.S. 97, 101 (1951) (citing *Chambers v. Florida*, 309 U.S. 227, 237 (1940), and *Brown v. Mississippi*, 297 U.S. 278, 285-86 (1936)). *Screws* does not extend § 242 to conduct not addressed in the statute, nor ever addressed by the Supreme Court.

In *Screws*, the Supreme Court reasoned that only its own opinions could provide sufficient notice under § 242 to make "specific" the constitutional right in question. 325 U.S. at 104. As we interpret the "make specific" requirement, the Supreme Court must not only enunciate the existence of a right, it must also hold that the right applies to a factual situation fundamentally similar to the one at bar. If the Court enunciates a right, but leaves some doubt or ambiguity as to whether that right will apply to a particular factual situation, the right has not been "made specific" as is required under *Screws* and

under traditional canons of construction of criminal statutes.

The "make specific" standard is substantially higher than the "clearly established" standard used to judge qualified immunity in section 1983 civil cases. The Court normally reviews constitutional rights in the context of section 1983 cases. In those civil, constitutional tort cases, the parties accused of violating constitutional rights have the protection of the qualified immunity doctrine. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (the operation of qualified immunity "depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified"). Government counsel do not admit the existence of such a "qualified immunity" defense in criminal cases. So interpreted, § 242 would mean that the criminal statute is much broader in scope than its civil counterpart. The government's theory of § 242 criminal liability would visit long criminal sentences on defendants who could successfully defend a constitutional tort case for damages on grounds that the federal constitutional law has not yet become "clearly established." Criminal liability would be much easier to establish for the same wrong than civil liability.

Civil law usually exacts less severe penalties, and consequently, the law allows for a more fluid interpretation in civil cases than in criminal cases. But here, according to the government, § 242 would be carried along on the currents of these civil law interpretations without the corresponding defenses allowed in civil damage cases.

Furthermore, unlike other criminal statutes, § 242 criminalizes violations of abstract rights at an extremely high level of generality and not particular

conduct that may be illegal under state law. As the *Screws* plurality noted, murder and assault committed under color of law may or may not violate § 242 depending on whether other factors are present that raise the conduct to the level of a constitutional deprivation. *Screws*, 325 U.S. at 108-09 ("The fact that a prisoner is assaulted, injured, or even murdered by state officials does not necessarily mean that he is deprived of any right protected or secured by the Constitution or laws of the United States."). For example, in *Screws*, the murder had to constitute a "trial by ordeal" to rise to the level of a procedural due process violation. In this case, we do not hold that simple or sexual assault may never violate § 242. For example, a sexual assault raising an equal protection gender discrimination claim may present an entirely different case.<sup>12</sup> We only conclude that sexual assaults may not be prosecuted as violations of a constitutional substantive due process right to bodily integrity, the only theory presented by government counsel. In doing so, we construe *Screws* narrowly, as we normally construe criminal statutes.

<sup>12</sup> Our dissenting colleagues in their various opinions repeat the refrain that local prosecutors and law enforcement officials in West Tennessee are so corrupt that they would not prosecute a member of the Lanier family for sexual assault. For example, Judge Wellford states, "it was clear that Judge David W. Lanier was not going to be called into account for his misdeeds and judicial misconduct by local or county officials who had been beholden to the longstanding sway of the Lanier dynasty." There is no factual basis in the record for such statements. There is no basis in the record for assuming anything other than that state and local officials cooperated in the investigation of the defendant in the normal way and then stepped aside when the federal prosecutor decided to take the case.

As counsel for defendant argues, permitting federal prosecutions for "conscience shocking" simple and sexual assaults committed by federal, state and local employees or officials places unparalleled, unprecedented discretion in the hands of federal law enforcement officers, prosecutors and judges. In the absence of any definition or limitations on the extent of the crime—and given that such prosecutions are useful political weapons—permitting such discretion is a particular risk for due process. Many public officials and employees have recently been accused of similar deviant conduct, but no other case has been prosecuted. Such an unprecedented, selective application of the statute in this case was possible only by giving the broadest possible construction to the most ambiguous of federal criminal statutes. The indictment in this case for a previously unknown, undeclared and undefined constitutional crime cannot be allowed to stand. Accordingly, the judgment of the court below is reversed and the Court is instructed to dismiss the indictment.<sup>13</sup>

<sup>13</sup> This appeal has produced five separate opinions, passionately and in some passages eloquently stated, in addition to the Court's opinion for nine judges. Allowing the defendant who is guilty of reprehensible conduct to go free is not a satisfying result, but it is the result required by longstanding principles of federalism, separation of judicial and legislative powers and the right to formal public notice when new crimes are enacted. It should be noted also that the defendant's conduct has not remained unnoticed. He has lost his robes, his income and his reputation. He was incarcerated for two years in federal prison pending appeal and will remain subject to prosecution in state court for many years to come. Tenn. Code Ann. §§ 39-13-502 through 506 (Supp. 1995) defines the crimes of "Aggravated Rape," "Rape," "Aggravated Sexual Battery" and "Sexual Battery" and §§ 40-2-101 provides statute of limita-

HARRY W. WELLFORD, Circuit Judge, concurring in part and dissenting in part.

To the extent that the majority has set aside the convictions of this state judge on five misdemeanor counts for sexual assault, without any resulting serious bodily injury to the victims, I concur in the result reached, although I do not agree with the majority decisions's rationale. I do so in order that 18 U.S.C. § 242, a venerable criminal statute that was originally designed to protect the rights of those recently freed from the bonds of slavery, not be trivialized. It is simply better to recognize that immoral, abusive conduct of a state judge should not be prosecuted in federal court if that deplorable conduct amounts to nothing beyond a state misdemeanor offense.

I dissent from the reversal of the convictions for the two felony offenses that I believe fall within the spirit and the meaning of 18 U.S.C. § 242. I agree with and adopt the separate dissenting opinion of Judge Daughtrey in this regard. I recognize that this is a difficult case, the first of its kind in our court (fortunately), and perhaps the first of this type against a state judge in any federal court. Further, I do not concur in the majority's condemnation of the prosecution for bringing the charges against a defendant who possessed great political and judicial power in his community and who abused that power shamelessly against those who came within the grasp of his authority.

The fundamental question in this case is whether gross abuse of state authority and state law (and

tions periods of 15, 8, 8 and 2 years respectively for these crimes.

custom) by a state actor amounts to deprivation of rights protected by the Constitution and laws of the United States. This defendant and his family have occupied positions of power and political authority in Dyersburg, Dyer County, Tennessee, for several generations. It was clear that Judge David W. Lanier was not going to be called into account for his misdeeds and judicial misconduct by local or county officeholders who had been beholden to the longstanding sway of the Lanier dynasty. The bringing of this indictment and the pursuit of a trial against Lanier was not, however, a political maneuver, nor was it an effort to impose federal will and law upon an opponent. It was not in any sense a "useful political weapon," but it was instituted to set a new precedent if Lanier were to be prosecuted at all.

The felony offenses, of which David Lanier was determined to be guilty by a court and jury, was expressly found to be shocking to the conscience of the court. As stated by the majority, the two felony counts charged "coercive sexual acts," which were found to be deprivations of liberty without due process of law by willful conduct of the defendant "using his official position as a [state] Chancellor."

The Supreme Court in *Screws v. United States*, 325 U.S. 91 (1945), as was rather grudgingly conceded by the majority, did uphold the constitutionality of 18 U.S.C. § 242 in the face of a challenge similar in many respects to that expressed by the majority and by the defendant himself. The objections expressed by Chief Judge Merritt are essentially that this statute was "too indefinite and too vague to meet due process standards." The crime in *Screws* involved a major state felony offense which deprived the victim under color of law "of certain constitutional rights guaran-

teed to him." *Screws*, 325 U.S. at 94. The defendant in *Screws* claimed, as does Lanier, that there was no noticed, determinable "standard of guilt" set out in 18 U.S.C. § 242. *Id.* at 95.

Quoting *Betts v. Brady*, 316 U.S. 455, 467 (1942), however, the Court in *Screws* upheld a then novel application of § 242:

The phrase [due process] formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, *shocking to the universal sense of justice*, may, in other circumstances, and in the light of other considerations, fall short of such denial.

*Id.* (emphasis added).

In upholding the constitutionality of the Act, the Court concluded:

We hesitate to say that when Congress sought to enforce the Fourteenth Amendment in this fashion it did a vain thing. We hesitate to conclude that for 80 years this effort of Congress, renewed several times, to protect the important rights of the individual guaranteed by the Fourteenth Amendment has been an idle gesture. Yet if the Act falls by reason of vagueness so far as due process of law is concerned, there would seem to be a similar lack of specificity when the privileges and immunities clause (*Madden v. Kentucky*, 309 U.S. 83) and the equal protection clause

(*Smith v. Texas*, 311 U.S. 128) of the Fourteenth Amendment are involved.

...

We do say that a requirement of a specific intent to deprive a person of a federal right made definite by decision or other rule of law saves the Act from any charge of unconstitutionality on the grounds of vagueness.

*Id.* at 100, 103 (footnote omitted).

In addition, *Screws* established the principle that a defendant charged with a violation of § 242 is not saved or excused by any claim that, when doing the assaultive acts, was not "thinking in constitutional terms;" when, however, his "aim was . . . to deprive a citizen of a right . . . protected by the Constitution." *Id.* at 106. The emphasis in *Screws*, as in *United States v. Classic*, 313 U.S. 299 (1941), and in this case, was upon the misuse of official state powers to the injury of a citizen who was subject to the officer's authority or control. Justice Rutledge described the criminal action as a "gross abuse of authority." *Screws*, 325 U.S. at 113 (concurring opinion).<sup>1</sup> He further observed in note 5 that "[i]t does not appear that the state has taken any steps toward prosecution for violation of its law." Neither has Tennessee prosecuted Lanier in the instant case.<sup>2</sup>

<sup>1</sup> The majority discusses, and disagrees with, the decision in *Screws* by its "interpretation" that it "diverges . . . from . . . well established canons of criminal law." There is no discussion, however, of *Classic*, cited as precedential authority in *Screws*.

<sup>2</sup> In footnote 12, the majority assumes that state and local officials were cooperating in the federal prosecution. There is

As noted by Justice Rutledge in *Screws, Classic* analyzed a number of cases which "sustained [the statute] in application to a vast range of rights secured by the Constitution." *Id.* at 121-22. Justice Rutledge also answered another objection made in this case: "the generality of the section's terms simply has not worked out to be a hazard of constitutional, or even serious, proportions . . . . Generally state officials know something of the individual's basic legal rights. If they do not, they should." *Id.* at 128, 129.

Our court has recently recognized:

"[O]nce a due process right has been defined and made specific by court decisions, that right is encompassed by § 242." *United States v. Stokes*, 506 F.2d 771, 774-75 (5th Cir. 1975) (citing *Screws*). Courts have applied § 242 to punish police officers who have abused their authority under "color of law."

*United States v. Epley*, 52 F.3d 571, 576 (6th Cir. 1995). In *Epley*, the constitutional right at issue was "[the] right to be free from 'seizure' without probable cause." *Id.* In my view, the right to be free of sexual assault is akin to the constitutional right recognized in *Epley*. In addition, other courts have recognized that "the Supreme Court seldom voids federal statutes on vagueness grounds." *Columbia Natural Resources v. Tatum*, 58 F.3d 1101, 1108 (6th Cir. 1995). The *Tatum* court inferred that the court would set aside a federal statute, such as § 242, only if "no

no question but that neither has taken any steps to prosecute Lanier on any basis during the *six years* since some of his offenses occurred in Dyer County, Tennessee.

standard of conduct is specified at all." *Id.* (quoting *United States v. Angiulo*, 897 F.2d 1169, 1179 (1st Cir.), *cert. denied*, 498 U.S. 845 (1990)). That Congress might "have chosen 'clearer and more precise language'" in § 242 is not sufficient to make out a vagueness challenge. *See United States v. Powell*, 423 U.S. 87, 94 (1975) (quoting *United States v. Petrillo*, 332 U.S. 1 (1947)).

The Supreme Court has recognized that persons, especially females, have a constitutional right to bodily integrity. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *see also Ingraham v. Wright*, 430 U.S. 651 (1977). Such a right from physical and sexual assault under 42 U.S.C. § 1983 was recognized in *Doe v. Taylor Independent School Dist.*, 15 F.3d 443 (5th Cir.) (en banc), *cert. denied sub nom.*, 115 S.Ct. 70 (1994).

If the Constitution protects a schoolchild against being tied to a chair or against arbitrary paddlings, then surely the Constitution protects a schoolchild from physical abuse—here, sexually fondling a 15-year old school girl and statutory rape. . . . It is uncontrovertible that bodily integrity is necessarily violated when a state actor sexually abuses a schoolchild and that such misconduct deprives that child of rights vouchsafed by the Fourteenth Amendment.

*Id.* at 451.

Other federal cases have enforced 18 U.S.C. § 242 in the context of state officers sexually assaulting or abusing their authority to demand sexual favors. *See United States v. Contreras*, 950 F.2d 232 (5th Cir. 1991), *cert. denied*, 504 U.S. 941 (1992) (affirming conviction of police officer under 18 U.S.C. § 242 for

sexually assaulting illegal immigrant in patrol car and attempting to kill her to prevent her from testifying); *United States v. Davila*, 704 F.2d 749 (5th Cir. 1983) (affirming conviction of border patrols under 18 U.S.C. § 242 for depriving illegal aliens of their liberty by coercing sexual favors from them). Many other cases have involved charges brought against state officials for physical assaults and other types of misuse of their power and authority. *See United States v. Brummett*, 786 F.2d 720 (6th Cir. 1986) (affirming conviction of jail officials under 18 U.S.C. § 242 for having inmates beat another prisoner); *United States v. Dise*, 763 F.2d 586 (3d Cir.) (affirming conviction of mental health worker under 18 U.S.C. § 242 for beating psychiatric patients), *cert. denied*, 474 U.S. 982 (1985); *United States v. Stokes*, 506 F.2d 771 (5th Cir. 1975) (police officer convicted under 18 U.S.C. § 242 for beating prisoner); *United States v. Occhipinti*, 772 F. Supp. 170 (S.D.N.Y. 1991), *aff'd*, 969 F.2d 1042 (2d Cir. 1992) (INS officer convicted under 18 U.S.C. § 242 for violating suspect's rights to be free from unlawful search and seizure).<sup>3</sup>

The district judge in this case instructed the jury that to convict the defendant the jurors had to find him guilty of physically abusive and unconstitutional conduct "of a serious and substantial nature" involving "physical force, mental coercion, bodily injury or emotional damage which is shocking to one's conscience." These were serious charges, far beyond mere sexual harassment or employment discrimination. Despite the fact that this prosecution

<sup>3</sup> I recognize that the absence of custody in the instant case makes it distinguishable from the above-cited § 242 criminal proceedings.

was a first, and the substantial reservations that I share about expansion or intrusion of federal authority, I would affirm Lanier's felony convictions under all the circumstances.

I would also find Lanier's actions here to constitute an official abuse of power under color of state law, not mere personal pursuits as he has claimed. In this respect, I quote from Judge Milburn's earlier opinion (now vacated) discussing this aspect of the case:

Defendant argues that his actions in this case were personal pursuits. However, the jury correctly concluded that defendant's actions in this case were taken under color of state law. First, all of the assaults took place in defendant's chambers during working hours, and during each assault there was at least an aura of official authority and power. Three of the victims, Sandy Sanders, Patty Mahoney, and Sandy Attaway, were present in defendant's chambers because they were working for him. On the first occasion Vivian Archie was assaulted, she had gone to defendant's chambers to apply for a secretarial position. On the second occasion Archie was assaulted, defendant used his continuing authority to determine custody of her child to coerce her into returning to his office. Finally, Fonda Bandy was assaulted while she was present in defendant's chambers to make a presentation about her parenting classes for juvenile offenders.

Further, there was evidence that defendant used his position to intimidate his victims into silence. Prior to the first assault, defendant told Archie that her father wanted to know how he could go about seeking custody of her child.

Defendant was also able to coerce Archie back into his office a second time because he knew she needed a job in order to ensure that she would keep custody of her child.

. . .

Furthermore, we wish to emphasize that his case involves much more than a defendant who is a mere public official. Rather, this case involves a state judge who committed various abhorrent and unlawful sexual acts in his chambers, oftentimes while wearing his judicial robe. We consider such egregious misconduct on the part of defendant to be shocking to the conscience of the court.

*United States v. Lanier*, 33 F.3d 639, 653 (6th Cir. 1994), *vacated*, 43 F.3d 1033 (1995).

Accordingly, I DISSENT from the majority's reversal of the felony convictions in this case.

DAVID A. NELSON, Circuit Judge, concurring in part and dissenting in part.

I do not question the validity of the general principles set forth in the majority opinion, and I agree with the majority's application of those principles to defendant Lanier's misdemeanor convictions. It does not seem to me that the women who were on the receiving end of the various "touchings" and "grabbings" described in the pertinent misdemeanor counts of the indictment were deprived of their "liberty" in the sense in which that term is used in the Fourteenth Amendment. Whether or not the oafish behavior described in these misdemeanor counts was enough to shock the conscience, therefore, I do not believe that such behavior was criminalized by 18 U.S.C. § 242.<sup>1</sup> I question, moreover, whether the jury could properly have found all of the touchings and grabbings in question to have been engaged in "under color of any law . . ."

The acts that the jury found to be felonious, however, could well be found to have been committed

<sup>1</sup> The Supreme Court has rejected the "shock the conscience" test for excessive use of force by the police, *Graham v. Connor*, 490 U.S. 386 (1989), and *Graham* left it uncertain to what extent, if at all, this fuzzy test may be applicable in other contexts. See *Braley v. City of Pontiac*, 906 F.2d 220, 226 (6th Cir. 1990). But see also *Collins v. City of Harker Heights, Texas*, 503 U.S. 115 (1992), where the Court seemed to assume some continuing role for the test.

With regard to n. 8 of the majority opinion, it is not the legislative labeling of the touchings and grabbings as misdemeanors that leads me to agree that they are not constitutional crimes under §242. The touchings and grabbings are not constitutional crimes, in my view, because they do not clearly entail a deprivation of liberty.

under color of law, in my view—and the victim of those acts was so clearly deprived of her liberty, as I see it, that the applicability of the statute strikes me as self-evident.<sup>2</sup> The theory of the felony counts was that the defendant willfully—and repeatedly—used the powers of his judicial office to coerce a woman named Vivian Archie into fellating him on pain of losing her child. Mrs. Archie was physically restrained throughout these assaults, according to her testimony, and she was afraid to scream for help because of the defendant's implied threats to deprive her of the custody of her little girl. The jury evidently thought that Mrs. Archie was telling the truth—and if the jury was right in this, it is hard for me to imagine a more clear-cut deprivation of liberty.

We need not rely on emanations from the penumbras of *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), to reach the conclusion that Mrs. Archie was willfully deprived of a constitutional right—and I confess myself somewhat mystified by the majority's

<sup>2</sup> One reading the statute without benefit of any judicial gloss might not think it self-evident that Section 242 criminalizes deprivations of constitutional rights regardless of motive, as opposed to criminalizing deprivations committed on account of the victim's "being an alien, or by reason of his color, or race. . . ." In *United States v. Classic*, 313 U.S. 299, 326-29 (1941), however, the Supreme Court squarely held that the quoted qualification applies only to the imposition of "different punishments, pains, or penalties," and does not apply to deprivations of constitutional rights generally. Under *Classic*, and under *Screws v. United States*, 325 U.S. 91 (1945), the rule seems to be that deprivation of any express constitutional right—including, of course, the right not to be deprived of life, liberty or property without due process of law—is criminalized by Section 242 if "willfully inflicted by those acting under color of any law, statute and the like." *Classic*, 313 U.S. at 329.

insistence that the right in question was a "newly-created" one. From the day it was adopted in 1868, the Fourteenth Amendment has prohibited the states from depriving any person of liberty without due process of law. Section 242 has long put the literate public on notice that any willful violation of this prohibition, if committed under color of law, is a crime. There is nothing ambiguous, abstract, or unclear about the statute in this respect, and at no point during the course of his trial did it occur to the defendant to claim otherwise.

If the jury got its facts right, Vivian Archie was literally (and humiliatingly) deprived of her liberty while locked in the defendant's foul embraces. We must take it as given that Mrs. Archie was restrained not only by the defendant's hands on her throat, but by the defendant's none-too-subtle suggestion that her daughter would be taken away from her if she resisted. On these facts, I simply cannot believe that the statesmen who framed the Fourteenth Amendment, or the Congress that enacted Section 242 in 1874, would have had any doubt that the defendant's conduct was unconstitutional.

Although it was not a constitutional case, *Union Pacific Ry. Co. v. Botsford*, 141 U.S. 250 (1891), may serve to remind us of the sensibilities of the age in which the provisions at issue here were adopted. The plaintiff in *Botsford* was a woman who claimed to have been injured in an accident aboard a railway car. The defendant railway company moved for a court order requiring the plaintiff to submit to a surgical examination—to be conducted, the defendant was at pains to explain, "in [a] manner not to expose the person of the plaintiff in any indelicate manner. . . ." Upholding a refusal by the trial court to order the

examination, absent any statute authorizing it, the Supreme Court observed that:

"No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Id.* at 251.

Vivian Archie, as the jury concluded in the case at bar, was deprived of the possession and control of her own person, and was subjected to the vilest sort of restraint and interference. Surely the *Botsford* court—a court that considered it "an indignity, an assault, and a trespass" for anyone, "especially a woman," to be compelled "to lay bare the body, or to submit it to the touch of a stranger," *id.* at 252—would have had some difficulty with the conclusion that a woman used in the way that the defendant apparently used Mrs. Archie was not deprived of her liberty.

It is true that the Supreme Court has not had occasion to decide explicitly whether Section 242 criminalizes a deprivation of liberty resulting from lust, but this does not suggest to me that lower courts are somehow estopped to apply Section 242 in this context. It would be passing strange, I think, if judges could acquire by prescription a right to make sex slaves of litigants or prospective litigants. And if the majority opinion is correct in the conclusion it draws from the absence of direct Supreme Court precedent, I am not sure that I understand how such a question could ever reach the Supreme Court in the first place.

It is also true that in recent years other public officials and employees may have engaged in deviant

behavior similar to the defendant's without having been prosecuted. I do not recall any such person having been accused of forcing a woman to choose between her virtue and her child. But if other public officials have escaped prosecution for using the power of public office to subjugate women in the way defendant Lanier is supposed to have done, I question whether it follows that the prosecution of defendant Lanier was improper. Perhaps the impropriety lies in the failure to prosecute the others.

It might well have been preferable for defendant Lanier to be prosecuted in a state court. For reasons to which Judge Wellford has alluded, however, that was probably not likely to happen. In any event, ineffectiveness of state criminal process is no more an element of the federal offense with which the defendant was charged than ineffectiveness of state drug laws is an element of a federal drug case. I certainly do not fault the decision of the United States Attorney to present this case to a federal grand jury, and I know of absolutely nothing to suggest that the defendant was a victim of "selective" prosecution.

Concurring in the reversal of the misdemeanor convictions, and dissenting from the reversal of the felony convictions, I join in the opinions of Judges Wellford and Daughtrey insofar as those opinions are consistent with the views I have stated.

DAMON J. KEITH, Circuit Judge, joining in the dissent.

Today, the majority, in an opinion thoroughly lacking in indignation for the outrageous acts perpetrated by Judge Lanier, reverses Lanier's conviction under 42 [sic: 18] U.S.C. § 242 on the grounds that § 242 does not expressly criminalize sexual assault committed against court employees and litigants by a state judge. I dissent for the reasons so eloquently stated by Judge Daughtrey. However, because I am deeply disturbed by not only the conclusion the majority has reached, but also by the insensitive tone and lack of compassion permeating the majority opinion, I add this additional comment.

In one of the most deplorable cases to come before this Court since I have served on the federal bench, the majority has done the public a great disservice. It is clear that in a society that has historically oppressed women, abuse of power by a judicial officer appointed or elected to ensure fairness is truly devastating. It is undeniable that Judge Lanier wielded tremendous power and influence in the Dyersburg, Tennessee community. His power over his victims was augmented by his position as employer to some and in the case of Vivian Archie, by his control over the custody arrangements of Archie's child. The shocking sexual assaults, forced sex acts and threats with which Judge Lanier victimized women are reprehensible. In my view, Judge Lanier's loathsome acts, combined with the fact that he was found to have sexually assaulted one of his victims while wearing his judicial robes, are more than enough to satisfy the most stringent interpretations for prosecution under § 242.

However, incredibly, the majority ignores the facts and the law to hold that § 242 does not criminalize such behavior. In order to reach its preposterous result, the majority not only dismisses clearly established law protecting each person's right to be free from interference with bodily integrity that shocks the conscience, but also ignores the outrageous nature of Judge Lanier's actions. Besides glossing over the horrendous acts for which Lanier was convicted, the majority, in cavalier fashion, also devalues the fact that Lanier was tried and found guilty by a jury of his peers and was later sentenced to twenty-five years in prison. In consideration of the above, the majority's holding does nothing less than render Judge Lanier's egregious acts acceptable.

As judges, we are guardians and trustees of the justice system. At a time when lack of public confidence in the justice system is at it greatest, the majority reaches a result that is guaranteed to further lower the public's trust. In a country where the average person may go to jail for stealing a loaf of bread, the majority releases back into the community a judge who has used the power of his office and his position in society to repeatedly victimize women. If federal law is not to protect women from being forced to sexually gratify a judicial officer at his request under threats of losing their jobs or children, whom is it to protect? Certainly, it was not intended to protect judges who commit such outrageous acts. No person is above the law, especially a judge. It is my firm belief that for people to have faith in our system of justice, the grossly offensive acts Judge Lanier committed against women at his mercy cannot be sanctioned by this Court. Sadly, the majority seems to have forgotten that while law is a means, "[j]ustice

is the end." See THE FEDERALIST No. 51 (James Madison) (Clinton Rossiter ed., 1961).<sup>1</sup> In this case, law has not served the ends of justice.

Accordingly, I join in Judge Daughtrey's dissent.

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<sup>1</sup> In *Federalist* paper No. 51, James Madison wrote: "Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit."

NATHANIEL R. JONES, Circuit Judge, dissenting.

One of the cardinal principles that guides my appellate review of criminal cases is to insure that outrage at the egregiousness of the complained of conduct has not intruded upon the application of neutral principles of law. Thus, in this case, the offensive and degrading conduct of Appellant Lanier prompted me to undertake a searching review of the record and legal precedents related to enforcement of various civil rights statutes. I candidly admit that my first reading of the majority opinion impressed me so greatly that I was forced to reexamine my initial decision to uphold the conviction.

A meticulous review of the record now assures me that the conviction in this case did not result in a criminalization of conduct based upon its outrageousness rather than its unconstitutionality. So assured, I dissent.

I can readily understand the result reached by the majority, given the premise from which it begins its analysis. However, my view of constitutional rights and of the evolvement principles, carries me to another analytical starting point. My belief is now clear that Lanier's actions against his victims transgressed their liberty interest enshrined in the constitution.

For me to agree with the majority would require that I hold, even at this late date in our civil rights and human rights development, that section 242 should be limited to deprivation of the discrete categories of property, contract, and equal protection. The narrow reading applied by the majority would abandon the Supreme Court's opinion in *Screws v. United States*, which upholds section 242 as it applies to willful violations of any constitutional right that

has been made specific. 325 U.S. 91, 104 (1945). Section 242 has proven to be a valuable tool in prosecuting willful violators of a number a constitutional rights. To list only a few, section 242 convictions have resulted from: violations of the Eighth Amendment right to be free from cruel and unusual punishment, *United States v. Tines, et al.*, 70 F.3d 891 (6th Cir. 1995); *United States v. Georvassilis*, 498 F.2d 883 (6th Cir. 1974); the Fourth Amendment right to be free from excessive force during detention, *United States v. Reese et al.*, 2 F.3d 870 (9th Cir. 1993); the Fourteenth Amendment procedural due process right to a trial before conviction, *United States v. Cobb, et al.*, 905 F.2d 784 (4th Cir. 1990). I note particularly that section 242 prosecutions have been brought for violations of Fourteenth Amendment substantive due process rights. In *United States v. O'Dell et al.*, 462 F.2d 224 (6th Cir. 1972), this court affirmed a section 242 conviction for a violation of a pretrial detainee's substantive due process right to be free from excessive force amounting to punishment. I see no barrier to applying section 242 to violations of substantive due process rights just as it is applied to violations of other constitutional rights. The only hurdle is demonstrating that the right has been made specific by decisions of the courts of the United States.

Like Judge Daughtrey, I believe that court decisions have made specific the right to be free from invasions of bodily integrity that shock the conscience. In my dissent from the majority opinion in *Wilson v. Beebe*, I acknowledged a protected liberty interest in personal dignity and bodily integrity. 770 F.2d 578, 594 (6th Cir. 1985) (Jones, J. dissenting). The complainant in *Wilson* sustained critical injuries

after being shot by a police officer who attempted to handcuff him while holding his cocked service revolver in one of his hands. *Id.* As Judge Daughtrey has in this case, in *Wilson*, I drew from the Supreme Court's decision in *Ingraham v. Wright*, 430 U.S. 651, 672 (1977), as the source of the liberty interest. I concur in Judge Daughtrey's discussion of the development and establishment of the right to bodily integrity and accordingly see no need to repeat the discussion in this separate opinion.

Moreover, I am not disturbed that the Supreme Court has not held specifically that sexual assault violates the right to bodily integrity. This reflects only the reality that a number of ways exist to deprive one of a right. Surely the majority would not suggest that a deprivation of property or contract would be any less a deprivation because it was accomplished by a means not previously addressed by the Supreme Court. If a right to bodily integrity includes freedom from corporal punishment, freedom to make reproductive decisions and freedom from unwanted medical intrusions, it must include protections from forced sexual advances. Further, as Judge Daughtrey points out, violations of bodily integrity by sexual assault have previously been the basis for convictions under section 242.

I must also dissent from the majority's rejection of the right to bodily integrity as grounds for a section 242 conviction because its bounds have been established in civil rather than criminal cases. Once established, a constitutional right is absolute. Of course, the degree of infringement necessary to support a suit may differ depending upon whether the suit is civil or criminal. I cannot, however, endorse a policy of denying the basic existence of a right in a

criminal case because the courts have developed the right in civil rather than criminal cases. As stated by the Ninth Circuit:

There is nothing wrong with looking to a civil case brought under 42 U.S.C. § 1983 for guidance as to the nature of the constitutional right whose alleged violation has been made the basis of a section 242 charge. The protections of the Constitution do not change according to the procedural context in which they are enforced—whether the allegation that constitutional rights have been transgressed is raised in a civil action or in a criminal prosecution, they are the same constitutional rights.

*United States v. Reese*, 2 F.3d 870, 884 (9th Cir. 1993), cert. denied 114 S.Ct. 928 (1994). Likewise, in *United States v. Bigham*, the Fifth Circuit stated:

Whether a case is brought on the civil or criminal side of the docket, the actionable conduct is deprivation of rights secured by the Constitution or laws of the United States. The culpable intent will vary from willfulness of a criminal charge to something less in a civil complaint, and it may vary according to the particular constitutional right infringed. Otherwise, between the criminal and civil statutes the courts recognize the intent of Congress to cover the same cases, though providing different remedies.

812 F.2d 943, 948 (5th Cir. 1987) (citations omitted). Once a right has been made a definite and specific part of the body of Fourteenth Amendment due process rights, a willful violation of that right comes within the purview of section 242. *United States v. Stokes*,

506 F.2d 771, 776 (5th Cir. 1975) (relying on both criminal and civil cases to hold the right to be free from injury while in police custody had been made specific). Even though the parameters of the right to bodily integrity have been forged primarily in civil cases, the right has been made specific nonetheless. Therefore, there should be no question that the violation of the right may serve as the basis of a prosecution under section 242.

I share the majority's view that the monstrous nature of a defendant's actions must not lead the courts to expand federal criminal statutes beyond their intended reach. Principles of strict construction require this court not to do so. The Supreme Court, however, has approved, in this unique instance, a criminal statute that changes with the changing nature of due process rights. The Supreme Court recognized in *Screws* that not every law enforcement officer would be aware of the full range of rights that might be constitutional. For that reason, the Supreme Court limited the application to section 242 to rights made specific. *Screws*, 325 U.S. at 104. A criminal conviction based on a right not fully defined and developed by the courts would violate principles of notice and strict construction. Nevertheless, when the courts fully define the parameters of the right, notice has been given that violation of such a right may result in a criminal conviction.

Some of my colleagues apparently and understandably fear that a criminal statute cannot cross reference a series of rights that may be ever changing. However, the nature of the substantive due process right is to change to protect that values of our times. Without elastic principles of due process, many of our greatest civil rights challenges could not have been

overcome. Although appealing on one level, I have concluded that worries that [Section] 242 will provide an impermissibly flexible body of criminal law are not well founded. The Supreme Court built safeguards into the statute by requiring the specific establishment of rights and by requiring willful violations. Without the establishment of a right by the courts, there is no danger that runaway or other opportunistic prosecutors will break open the bounds of the statute with crimes that were never meant to be encompassed by its reach. Courts are entrusted with the duty to decide when a right is constitutional. Only after this decision has been made are prosecutors afforded the opportunity to bring indictments.<sup>1</sup>

Again, I note my agreement with the principles behind the majority's push to limit the application of section 242. Without legislative action, the criminal

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<sup>1</sup> In its footnote 9, the majority expresses its belief that the dissenters somehow have not contemplated the effect that holding violations of bodily integrity are within the reach of section 242. By listing the number of potential violators, the majority seems to reason that because a wide range of government employees may regularly violate citizens' bodily integrity, section 242 cannot be used to criminalize such violations. The majority's statement lacks the support of logic. The number of violators should not determine whether an action is criminal. It is unlikely that the majority would decline to affirm section 242 violations of Fourth or Eighth Amendment rights merely because many police officers around the country beat and abuse inmates on a regular basis. If the number of conscience shocking violations occurring regularly is near to what the majority suggests, criminal prosecution is perhaps even more important. Furthermore, criminal prosecution of some of these allegedly rampant violations may serve as a deterrent to prevent continued encroachments on individuals' bodily integrity.

law generally cannot be freely expanded to meet the outrage of an angry community. Such elasticity in the law would make potential defendants of those whose actions disturb a particular prosecutor or community but not the populace at large. Minorities, who have traditionally suffered the most injustice at the hands of our criminal law, would be especially vulnerable to a criminal law that makes unpopular actions criminal without endorsement of the legislature and without notice to the potential violator. I am comfortable with the elasticity of section 242 only because its growth is checked by its link to our Constitution. I am secure in my knowledge the link between the statute and the Constitution will prevent section 242 from being used as a tool to prosecute those whose actions are merely unpopular in a particular community. The disgusting and reprehensible conduct of Appellant Lanier sinks far below any characterization of merely unpopular or unacceptable. Lanier's conduct clearly violated constitutional rights and falls squarely within the range of conduct Congress intended to punish with section 242.

I join in Judge Daughtrey's opinion to the extent it is consistent with my views stated here, and I respectfully DISSENT.

MARTHA CRAIG DAUGHTREY, Circuit Judge, dissenting.

Apparently because the United States Supreme Court has never held, specifically, that 18 U.S.C. § 242 proscribes sexual assault by a sitting state judge, committed against litigants, court personnel, or those involved in court-related programs, the majority today reverses the defendant's convictions under § 242 and declares that the charges against him should not have been brought. This result rests on the majority's conclusion that the federal constitution offers no protection against such assaults. Because I conclude, to the contrary, that such constitutional protection is well-entrenched, I respectfully dissent.

# I.

In its opinion, the majority sets out, at some length, the fruits of its exhaustive research into the legislative history of § 242. Missing, however, is even a brief sketch of the factual history of this case, so necessary to put the constitutional analysis in context. Those facts were fairly and dispassionately summarized by the three-judge panel that first heard this appeal, as follows:

The evidence presented at trial showed that defendant was born in Dyer County, Tennessee, and had lived there virtually all his life. Defendant is from a politically prominent family. He served as alderman and mayor of Dyersburg, Tennessee, before first being elected Chancery Court Judge of the Twenty-Ninth Judicial District in 1982. Defendant was reelected in 1990. He continued to serve as a chancery court judge until he was removed from his position pending resolution of this case.

As a chancery court judge, defendant principally presided over divorces, probate matters, and boundary disputes. Although the circuit court also has concurrent jurisdiction . . . over divorce cases, defendant presided over 80 to 90 percent of the divorce cases in Lake and Dyer Counties, including child support and other matters related to the divorce cases. Further, . . . defendant also served as juvenile court judge in said counties.

In 1989, defendant hired Sandy Sanders to be the Youth Service Officer of the Dyer County Juvenile Court. Sanders was to supervise the Youth Service Office. During her job interview, defendant told Sanders that he had sole hiring authority for the Youth Service Officer position. Defendant also had the authority to fire the Youth Service Officer.

As part of her job duties, Sanders was required to have weekly meetings with defendant to review the work performed by her office. During one of these weekly meetings, which occurred in defendant's chambers, defendant got up from his desk, sat beside Sanders in a chair, and, during their conversation, grabbed and squeezed her breast. Sanders became upset and tried to remove defendant's hand; however, defendant told her not to be afraid.

Sanders left the meeting as quickly as possible. She did not tell anyone about what had occurred because she thought that no one would believe her since defendant was a judge and was influential in the community. Subsequently, Sanders telephoned defendant and told him she needed to meet

with him. She went to defendant's chambers, told him she did not appreciate his action, and received an apology from him.

Sanders continued to have weekly meetings with defendant. However, after she confronted him about his actions, he began complaining about the quality of her work, and, eventually, he took away her supervisory authority. Sanders testified that she believed defendant took away her supervisory authority in retaliation for her confrontation with him. She testified that she considered quitting her job, but she remained in her position because she believed she was helping the children she worked with.

Defendant testified that he was often alone with Sanders in his chambers; however, he denied ever touching her breast. He testified that prior to the alleged incident, he and Sanders would hug and kiss each other as a friendly greeting. Defendant testified that he stopped such behavior after Sanders told him she was no longer comfortable hugging him.

In the fall of 1990, defendant hired Patty Mahoney to be his secretary. Mahoney was recently divorced and had two young children to support. Mahoney understood that defendant was her supervisor and had the power to fire her. Mahoney was uncomfortable with defendant because she felt that he had inappropriately hugged her during her job interview. However, she accepted the job because, for a person without a college degree, it was a good job in Dyersburg.

Mahoney testified that she worked for defendant for two weeks, but she quit when it became apparent that he was not going to leave her alone. She testified that while she worked in defendant's chambers, he would hug her or touch her on her breasts or buttocks. By the second day of her employment, defendant began to firmly place his hands on her breasts.

Mahoney testified that defendant eventually became more aggressive, grabbing and squeezing her breasts, rather than just placing his hands on them. [Defendant also telephoned Mahoney at her home, invited her to vacation with him in the Bahamas, and told her, "If you will sleep with me, you can do anything you want to. You can come in to work any time you want to, you can leave any time you want to."] She confronted him about his behavior, but he told her that if she reported his behavior it would hurt her more than it would hurt him. Mahoney testified that since the Lanier family was so powerful, she thought that no one would hire her if she reported defendant's behavior.

Despite her confrontation with defendant and her efforts to avoid being alone with defendant, the touching and grabbing of Mahoney's breasts continued on a daily basis. After deciding she would quit, Mahoney telephoned defendant from her home and informed him of her decision. Mahoney went to work the next day and met with defendant in his chambers. She broke down crying, telling him that she needed the job and wanted him to leave her alone. At that point, defendant put his

arms around her, lifted her off the floor, and aggressively hugged her. Then, with one hand on the lower part of Mahoney's back, defendant slid her down his body and pressed his pelvis against her. That same night, Mahoney called defendant and told him she was quitting. She worked one more week because she needed the job.

\* \* \* \* \*

At trial, defendant denied that he ever touched Mahoney in a sexual manner or grabbed either her breasts or buttocks. However, defendant testified that he and Mahoney hugged every day.

Vivian Archie grew up in Dyersburg and was acquainted with the Lanier family. She married in 1988 and gave birth to a daughter. She was divorced the following year. Defendant presided over her divorce proceedings and awarded the custody of her daughter to her.

In 1990, Archie was out of work and living with her parents. Archie learned that a job was available at the courthouse. She went to the courthouse, filled out an application for a secretarial position, and met with defendant in his chambers. At the outset of their meeting, defendant told Archie that her father had come to see him that day. Defendant said that Archie's father had told him that she was not a good mother, and he wanted custody of her child.

Archie became frightened and asked defendant if he was going to take her daughter away from her. Defendant told her that he could not talk about it

because he was the judge who would preside over any such case. Defendant told Archie that he had already promised the job to someone else. Archie replied that she needed the job and would do anything to get a job. She testified that she stated this because, otherwise, defendant would have leverage to take her child away.

When Archie was ready to leave, she reached across the desk to shake defendant's hand. At that point, defendant grabbed her hand, pulled her around to the end of his desk, and grabbed her hair and neck. When Archie told defendant to stop and tried to push him away, he twisted her neck and tried to fondle her. Defendant kept pulling Archie's hair and neck, and finally, he turned around and threw her into a chair. Defendant then [placed his hand under her jacket and repeatedly tried to force his tongue into her mouth], and each time she tried to get away, he would squeeze her neck harder. Finally, defendant stood over Archie, exposed his penis, and pulled her head down and her jaws open. He then forced his penis into her mouth and moved his pelvis back and forth with great force. Archie testified that this hurt her throat and jaw.

Defendant did not stop until he had ejaculated in Archie's mouth. Archie, who was crying, got up and went into defendant's bathroom to clean her mouth and face so that she could leave the courthouse. Archie testified that when she got home, her head was tender where defendant had pulled her hair; her neck was sore, and when she brushed her hair where defendant had pulled it, some of her

hair fell out. Archie also testified that she did not scream when defendant attacked her or report the incident because she was afraid he would take custody of her child from her [and because defendant's brother was then the prosecutor for the area].

A few weeks later, defendant telephoned Archie's residence and told her mother he had a job for her. Defendant did not tell Archie's mother where the job interview would be located. Rather, he told her mother that Archie would have to come by his chambers to get the information. Archie was reluctant to call defendant; however, at her mother's insistence, she returned his telephone call. Although Archie repeatedly asked defendant to tell her where the job interview was, he insisted that she return to his chambers for the information. Archie then returned to defendant's chambers believing that if she did not, her parents would be furious with her and defendant would believe that she had told her parents about the assault.

When she arrived at defendant's chambers, he told her about a secretarial position in the office of Dr. Lynn Warner. Archie told defendant she knew where Dr. Warner's office was located because he had been her doctor since she was a child. While they were talking, defendant walked around his desk towards Archie. She tried to get out of the room, but he slammed the door closed and began kissing her. She told him to stop, but he began pulling her hair and threw her into a chair. As she was saying "no," defendant again exposed

himself, turned her head, pulled her mouth open, and forced her to perform oral sex. During this period, defendant continued to grab Archie by the hair, squeeze her neck and shoulders, and pull her head back, all of which caused her great pain. Archie also testified that during this period she was crying, gagging, choking, and having trouble breathing. Defendant again ejaculated in her mouth. She ran crying into his bathroom and cleaned up her mouth and face so that she could go to her job interview.

Archie did not report either of the assaults because her child custody case had been in defendant's court, and she was afraid that defendant would take her daughter away from her. Archie testified that she subsequently met with defendant and that he asked her if she had said anything to anyone and also asked why she had not been back to see him. Defendant then asked Archie how her family life was going. Archie testified that she interpreted defendant's remarks to mean that he would permit her to keep custody of her daughter if she did not tell anyone what had happened.

At trial, defendant acknowledged that he was alone with Archie in his chambers on both of the occasions mentioned in her testimony, but he denied ever assaulting her or having oral sex with her. He testified that Archie came to him looking for a job and he told her he did not have one available, but he would let her know if he learned of one. He also admitted telling Archie that he had met her father and that her father wanted to

know how to go about getting custody of Archie's daughter.

Defendant admitted that he told Dr. Warner that Archie needed a job and that he set up an interview for her with Dr. Warner. Defendant also admitted that he told Archie to come to his chambers so he could tell her where the interview was. Defendant testified that Archie did come to his chambers and that he sent her to Dr. Warner for the interview.

Dr. Warner testified as a defense witness. He testified that Archie never told him that defendant forced her to have sex with him. On cross-examination, Warner testified that Archie did tell him that defendant requested oral sex and that she performed oral sex. Dr. Warner also testified on cross-examination that he discussed Archie with defendant, and defendant told him that Archie might be willing to provide sexual favors. As a result, Warner agreed to interview Archie for the job.

\* \* \* \* \*

In March 1991, defendant hired Sandy Attaway, age 26, to be his secretary. After her first month of work, defendant began making sexual comments to Attaway. He told Attaway that he would loan her money and they could work out a payment. He also asked Attaway what she would do for him if he let her off from work. Finally, defendant told Attaway that he knew how he could relieve her stress and she could relieve his. Attaway believed these comments referred to sex.

Defendant also asked Attaway if she were afraid of him. She testified that she told him "no," although that was untrue, because she did not want him to think she was weak and could be intimidated. Defendant told Attaway that he was a judge, and everyone should be afraid of him.

Defendant then went from sexual comments to physical contact with Attaway. He began hitting her on the buttocks when she walked by him. Further, when Attaway was in defendant's chambers to have him sign some papers, he walked around behind her and threw his arms around her. Defendant then[, while still wearing his judicial robes,] pushed his pelvic area into Attaway's buttocks and began making a grinding motion. She could tell that defendant's penis was erect because she felt him rubbing it against her. Attaway then yelled at defendant to stop. He told her to lower her voice because there were people in the courtroom, and defendant was afraid they would hear Attaway.

\* \* \* \* \*

Attaway did not quit after the assault because she needed the job. However, three months later, defendant terminated Attaway on the ground that things were not working out. Attaway testified that she saw defendant at the courthouse after he had terminated her, and defendant told her they would have gotten along fine if she had liked to have oral sex.

Defendant testified regarding Attaway's allegations. He denied sexually assaulting her in any way.

In the fall of 1991, Fonda Bandy met with defendant in his chambers, concerning her work for a federal program, Drug Free Public Housing. Bandy wanted to implement a new program of parenting classes for parents who lived in public housing and had children before the juvenile court. Since defendant was the juvenile court judge, Bandy arranged a presentation about the program for him. She hoped that he would refer parents to her program as part of their children's sentencing.

\* \* \* \* \*

Bandy testified that when she began to leave defendant's chambers, he put his arms around her and started kissing her. As she tried to turn and pull away, defendant put one of his hands behind her head and pulled her up to him. Defendant then began to fondle one of Bandy's breasts and she tried to push him away. When she eventually pulled herself free, Bandy saw that defendant had lipstick all over him.

Bandy was shaken and panicked, and she went into the bathroom to clean herself up before leaving defendant's chambers. After she left the bathroom, Bandy had to walk past defendant's desk to exit his chambers. As she walked by, defendant, who was sitting on the end of his desk nearest the door, reached out and put his hand on Bandy's crotch. Bandy momentarily hesitated and then

kept on walking towards the door. Defendant followed her to the door and told her that if she came back, she would have all the clients that she wanted for her new program.

Bandy testified that she never returned to see defendant because she did not want to have to go through that kind of treatment again. Defendant only referred two individuals to Bandy's program. These two individuals had cases pending before defendant at the time of his meeting with Bandy, and defendant and Bandy had discussed their cases. Bandy testified that she did not report the incident with defendant because he was a judge and she did not want too many people to know about it.

Defendant testified and admitted that he had met with Bandy alone in his chambers. He denied ever sexually assaulting Bandy. Defendant also testified that after their meeting, Bandy came over to him and hugged and kissed him.

*United States v. Lanier*, 33 F.3d 639, 646-50 (6th Cir. 1994), *vacated*, 43 F.3d 1033 (6th Cir. 1995).

In light of these facts, the grand jury returned against Lanier an 11-count indictment enumerating alleged violations of "the right not to be deprived of liberty without due process of law, including the right to be free from wilfull [sic] sexual assault, . . . all in violation of Title 18, United States Code, Section 242." At trial, the jury, after being instructed that the improper conduct must be "so demeaning and harmful under all the circumstances as to shock one's conscience," convicted the defendant on two felony and five misdemeanor counts in connection with the

egregious behavior. The majority, however, now holds that prosecution pursuant to § 242 was improper based upon its examinations of legislative history, case law, canons of judicial interpretation, and constitutional notice requirements. I respectfully suggest that such analyses ignore historical facts and jurisprudential precepts that mandate a contrary conclusion.

## II.

### A. Examination of Legislative History

Presently, 18 U.S.C. § 242 provides, in relevant part:

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, . . . shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section . . ., shall be fined under this title or imprisoned not more than ten years or both . . . .

At first blush, the provisions of the statute would seem to outlaw unambiguously the willful deprivation under color of law "of any rights . . . secured or protected by the Constitution." (Emphasis added.) Ordinarily, such a lack of ambiguity would preclude a foray into the uncertainties of legislative history. As Chief Judge Merritt himself announced in *United States v. Winters*, 33 F.3d 720, 721 (6th Cir. 1994), *cert. denied*, 115 S.Ct. 1148 (1995), "[o]nly if the language of the statute is unclear do we look beyond the statutory

language to the intent of the legislature." Nevertheless, in this case, simply by declaring § 242 to be "perhaps the most abstractly worded statute among the more than 700 crimes in the federal criminal code," the majority justifies its extensive recounting of the historical development of the provision. Then, despite acknowledging that the forerunner of today's § 242 clearly expanded the scope of criminal liability for constitutional violations, the majority would have us ignore the clear language of the statute and conclude that Congress did not intend to criminalize all willful violations of constitutional rights committed under color of law.

The majority's analysis and conclusions are interesting as an academic exercise attempting to divine the motivations of a disparate collection of legislators, acting over a century ago on what appears (as is often the case with legislative action) to be a less than fully educated basis. That analysis fails, however, to accord appropriate deference to the holdings of Supreme Court decisions that are binding upon this tribunal today. Specifically, in *Screws v. United States*, 325 U.S. 91, 104 (1945), the Court recognized that § 242 reached not only to a static, limited group of super-constitutional rights, but also to any right "which has been made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them." (Emphasis added.) Similarly, in *United States v. Price*, 383 U.S. 787, 803 (1966), the Court noted that § 242, like its companion provision, 18 U.S.C. § 241, includes in its protections a "wide range of rights: . . . 'any rights, privileges, or immunities, secured or protected by the

Constitution or laws of the United States.'"<sup>1</sup> Thus, "the 'customary stout assertions of the codifiers that they had merely clarified and reorganized without changing [the] substance' [of § 242] cannot be taken at face value." *Maine v. Thiboutot*, 448 U.S. 1, 8 n.5 (1980) (quoting *United States v. Price*, 383 U.S. at 803).

Moreover, over the years, and through subsequent amendments, Congress has not seen fit to alter § 242 in the face of Supreme Court decisions that contradict the position espoused by the majority. If Congress itself has not found it necessary to correct the supposed misconstruction of the reach of § 242, this court should be hesitant now to fill in the gap that the majority attempts to create. Instead, we should limit our inquiry in this case to the relevant question of whether court decisions had "made specific," by the time Lanier committed the acts for which he was convicted, a constitutional right to be free from interference with bodily integrity.

#### B. Examination of Case Law

At the outset, it should be noted that the majority appropriately does not contend that judges are immune from prosecutions under § 242. See *Briscoe v. LaHue*, 460 U.S. 325, 345 n.32 (1983). Also, the majority does not, and indeed cannot, contend that Lanier did not perform the reprehensible acts that form the basis of the jury's verdict in this matter.

<sup>1</sup> Concurring in *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 661 n.34 (1979), Justice White also noted that "[t]itle 18 U.S.C. §§ 241 and 242 encompass the same rights. See *United States v. Price*, 383 U.S. at 797; *United States v. Guest*, 383 U.S. 745, 753 (1966); *Screws v. United States*, 325 U.S. at 119 (Rutledge, J., concurring).

Finally, the majority does not question the conclusion that those acts were committed under "color of law." Instead, in deciding to dismiss the indictment issued against Lanier, the majority insists that the constitutional right upon which the prosecution based its case, the right to be free from interference with bodily integrity that shocks the conscience, had not been recognized in a United States Supreme Court opinion at the time the defendant committed the acts of which he was accused.

As mentioned earlier, *Screws* held in 1945 that the reach of § 242 extends to any right "which has been made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them." *Screws v. United States*, 325 U.S. at 104. In this case, the government does not rely upon any express constitutional provision "making specific" the right of individuals to be free from interference with their bodily integrity. Instead, the prosecution submits that principles of substantive due process, *as interpreted by the federal courts*, protect and make specific the very right asserted in this prosecution.

This court has previously recognized that deprivations of due process fall into two categories: "violations of procedural due process and violations of substantive due process . . ." *Mansfield Apartment Owners Assoc. v. City of Mansfield*, 988 F.2d 1469, 1473-74 (6th Cir. 1993). In turn, substantive due process violations themselves can be grouped into two separate classifications. "The first type includes claims asserting denial of a right, privilege, or immunity secured by the Constitution or by federal statute other than procedural claims under 'the Fourteenth Amendment simpliciter.'" *Mertik v.*

*Blalock*, 983 F.2d 1353, 1367 (6th Cir. 1993) (quoting *Parratt v. Taylor*, 451 U.S. 527, 536 (1981)). "The other type of claim is directed at official acts which may not occur regardless of the procedural safeguards accompanying them. The test for substantive due process claims of this type is whether the conduct complained of 'shocks the conscience' of the court." *Mertik v. Blalock*, 983 F.2d at 1367-68. It seems obvious to me, as it did to the prosecution, the district court, the federal jury, and the original panel that heard this appeal, that federal case law establishes that interference with an individual's bodily integrity under circumstances similar to those involved in this case is in fact so repulsive and deviant as to fall within this second category of substantive due process violations.

In order to reach a contrary conclusion, the majority twice dons blinders that hinder it from according § 242 the power to battle the forces of oppression that prompted enactment of the Fourteenth Amendment and the various statutes executing its protections. First, the majority constructs on its own the requirement that *only* Supreme Court case law be referenced when determining whether a constitutional right has been made specific for purposes of § 242 because reliance upon lower court decisions to define those rights raises the possibility of inconsistent enforcement across the country.

Acceptance of such an argument again necessitates another misreading of Supreme Court precedent. In *Screws*, when listing the sources capable of defining protected constitutional rights, Justice Douglas included "*decisions* interpreting [the Constitution and laws of the United States]," not only *Supreme Court decisions* providing such interpretations.

*Screws v. United States*, 325 U.S. at 104 (emphasis added). Moreover, the *Screws* plurality opinion clearly states, "In the instant case the decisions of the courts are, to be sure, a source of reference for ascertaining the specific content of the concept of due process." *Id.* at 96 (emphasis added). Such language is plainly inconsistent with a requirement that only the decisions of a specific court define the scope of due process rights.

Furthermore, the fears that prompted the majority's attempt to limit the possible sources of explication of rights listed in *Screws* are not relevant in this instance. Where all federal courts addressing analogous situations have accepted the long-standing existence and viability of a right to freedom from interference with bodily integrity protected by the substantive provisions of the due process clause, no danger of inconsistent interpretations and enforcement of the law is present.

Even more troubling than the majority's restriction of the *Screws* holding, however, is the fact that in order to arrive at the conclusion it does today, the majority is also forced to reject or ignore, without logical explanation, the import of the holdings of a number of Supreme Court decisions that clearly recognize a constitutional right to bodily integrity. See, e.g., *Planned Parenthood v. Casey*, 112 S.Ct. 2791 (1992); *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990); *Youngberg v. Romeo*, 457 U.S. 307 (1982); *Ingraham v. Wright*, 430 U.S. 651 (1977). These decisions do not specifically mention sexual assaults upon individuals under color of law. Consequently, even though Lanier's conduct in this matter is, in many ways, far more egregious than the actions discussed in the cited cases, the majority

concludes that such precedent cannot support the contention that the "right to be free from rape and sexual assault and harassment has also been recognized by the Supreme Court generally as a component of an enforceable general constitutional right to 'bodily integrity.'"

In *K.H. Through Murphy v. Morgan*, 914 F.2d 846 (7th Cir. 1990), however, the Seventh Circuit recognized that the logical interpretations of existing law cannot be ignored by the courts simply because *factually* similar cases are not presented. Instead, the underlying principles of relevant case law should be given vitality in such instances. As the court noted:

The easiest cases don't even arise. There has never been [for example,] a section 1933 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages liability because no previous case had found liability in those circumstances.

*Id.* at 851.

Likewise, here, no Supreme Court decision has *explicitly* ruled that constitutional principles protecting bodily integrity forbid a sitting judge, in his chambers, and in some cases, while in his judicial robes, from fondling and raping women with business before his court. Such a scenario, however, is the "easy" case that demonstrates a blatant violation of those Supreme Court and courts of appeals precedents that have "made specific" the fact that interference with personal security and bodily integrity that shocks the conscience is proscribed by the substantive due process principles of the Fourteenth Amendment.

### 1. Supreme Court Treatment of Bodily Integrity

Short of attempting to catalogue every possible factual situation involving an intrusion upon personal security or bodily integrity, it is impossible to see how the Supreme Court could have more explicitly stated over the years that violations of that precious right cannot be tolerated in a free and civilized society. For example, the Court chronicled the fact that 780 years ago, the Magna Carta provided that "an individual could not be deprived of this right of personal security 'except by the legal judgment of his peers or by the law of the land.'" *Ingraham v. Wright*, 430 U.S. at 1413 n.41. As recognized by the Court, when the drafters of the Bill of Rights met more than 500 years later, they attempted to provide Americans with "at least the protection against governmental power that they had enjoyed as Englishmen against the power of the Crown" by engrafting that same principle from the Magna Carta into our constitution's due process clause. *Id.* at 1413.

In *Youngberg v. Romeo*, 457 U.S. at 315, the Supreme Court reiterated, citing *Ingraham*, that "[i]n the past, this Court has noted that the right to personal security constitutes a 'historic liberty interest' protected substantively by the Due Process Clause." Then, in *Cruzan*, the Court again referenced the "notion of bodily integrity" and recognized:

Before the turn of the century, this Court observed that "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."

*Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. at 269 (quoting *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 (1891)).

As recently as 1992, the Supreme Court yet again affirmed the long-standing constitutional principle that the majority now overlooks when that Court stated, "It is settled now, as it was [in 1971 and 1972] when the Court heard arguments in *Roe v. Wade* [410 U.S. 113 (1973)], that the Constitution places limits on a State's right to interfere with a person's . . . bodily integrity." *Planned Parenthood v. Casey*, 112 S.Ct. at 2806. Although *Planned Parenthood v. Casey* and the other Supreme Court cases cited above admittedly did not involve a sexual assault, and although those cases may not have dealt with actions taken by a state judge, such factual differences among the cases are immaterial to the underlying reality that the Supreme Court has clearly and consistently proclaimed that the constitution's due process clause protects an individual from interference with bodily integrity under color of law under circumstances that would shock the conscience of the court.

### 2. Appellate Court Treatment of Bodily Integrity

Furthermore, all circuit courts that have addressed this or similar issues have likewise recognized the seemingly axiomatic principle that a citizen's right not to be deprived of life, liberty, or property without due process of law encompasses the right not to be intentionally and sexually assaulted under color of law. In *United States v. Davila*, 704 F.2d 749 (5th Cir. 1983), for example, Davila and a co-defendant, officers of the United States Border Patrol, were charged under 18 U.S.C. § 242 with coercing two women to submit to sexual intercourse with them in

return for allowing them to enter the country illegally. The Fifth Circuit unanimously affirmed the convictions without commenting on the basis for the prosecution.

Similarly, in *United States v. Contreras*, 950 F.2d 232, 236 (5th Cir. 1991), *cert. denied*, 504 U.S. 941 (1992), the defendant, a police officer, was charged under § 242 with the criminal offense of “willfully depriving [the victim] of her constitutional rights, while acting under color of law, by sexually assaulting her . . .” while he was on duty. Again, the appellate court found no constitutional error in the convictions and affirmed the judgment of the district court.

Because the defendants in *Davila* did not expressly challenge their convictions under § 242 on appeal, the majority dismisses the importance of that case to the discussion presently before us. The defendant in *Contreras* also did not dispute the fact that a sexual assault perpetrated under color of law fell within the proscriptions of the due process clause. Presumably, therefore, the majority would also dismiss the precedential value of that case for the same reasons advanced in its discussion of *Davila*. Despite the majority’s casual treatment of prosecutions for sexual assaults under § 242, however, these cases provide further support for the proposition that court decisions had already recognized and “made specific” the constitutional right to be free from interference with bodily integrity prior to initiation of Lanier’s actions that resulted in this prosecution.

Other circuit court decisions rendered in civil actions brought pursuant to 42 U.S.C. § 1983 also recognize acceptance of this idea of the reach of

substantive due process principles.<sup>2</sup> See, e.g., *Walton v. Alexander*, 44 F.3d 1297, 1302 (5th Cir. 1995) (*en banc*) (reiterating the Fifth Circuit’s recognition that “[t]he right to be free of state-occasioned damage to a person’s bodily integrity is protected by the fourteenth amendment guarantee of due process”); *Canedy v. Boardman*, 16 F.3d 183, 185 (7th Cir. 1994) (quoting *Casey* for the proposition that “[i]t is settled now . . . that the Constitution places limits on a State’s right to interfere with a person’s . . . bodily integrity”); *Doe v. Taylor Independent Sch. Dist.*, 15 F.3d 443, 451 (5th Cir.) (*en banc*) (concluding that if due process considerations protect school children from arbitrary paddlings and other corporal punishment, “then surely the Constitution protects a schoolchild from physical sexual abuse”), *cert. denied*, 115 S.Ct. 70 (1994); *Dang Vang v. Vang*

<sup>2</sup> In *United States v. Reese*, 2 F.3d 870, 884 (9th Cir. 1993), *cert. denied*, 114 S.Ct. 928 (1994), the Ninth Circuit concluded:

There is nothing wrong with looking to a civil case brought under 42 U.S.C. § 1983 for guidance as to the nature of the constitutional right whose alleged violation has been made the basis of a section 242 charge. The protections of

the Constitution do not change according to the procedural context in which they are enforced—whether the allegation that constitutional rights have been transgressed is raised in a civil action or in a criminal prosecution, they are the same constitutional rights.

Furthermore, in concurring in the judgment in *Chapman v. Houston Welfare Rights Org.*, 441 U.S. at 662, Justice White explained that both §§ 242 and 1983 had their genesis in post-Civil War legislation and seek redress for violations of rights under color of law. He continued by stating, “Apart from differences relating to the nature of the remedy involved, [the two statutes] are commensurate.” *Id.*

*Xiong X. Toyed*, 944 F.2d 476, 479 (9th Cir. 1991) (finding that the defendant clearly "used his position in the state government to deprive these women of their constitutional right to be free from sexual assault"); *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 726-27 (3d Cir. 1989) (*en banc*) (holding that the constitutional right to freedom from invasion of personal security through sexual abuse was well-established even before *Ingraham* because "a teacher's sexual molestation of a student could not possibly be deemed an acceptable practice"), *cert. denied*, 493 U.S. 1044 (1990); *Shillingford v. Holmes*, 634 F.2d 263, 265 (5th Cir. 1981) (recognizing that "[t]he right to be free of state-occasioned damage to a person's bodily integrity is protected by the fourteenth amendment guarantee of due process"); *Hall v. Tawney*, 621 F.2d 607, 613 (4th Cir. 1980) (recognizing that not all criminal assaults will constitute violations of a constitutional right, but that the right to be free from intrusions into bodily security that shock the conscience "is unmistakably established in our constitutional decisions as an attribute of the ordered liberty that is the concern of substantive due process"); *Gregory v. Thompson*, 500 F.2d 59, 62 (9th Cir. 1974) (stating that "[t]he right violated by an assault has been described as the right to be secure in one's person, and is grounded in the due process clause of the Fourteenth Amendment"). Rather than giving credence to the underlying constitutional principles forming these decisions, however, the majority discounts the cases as irrelevant because the opinions, for the most part, accept without debate the uncontroverted principle that, throughout our jurisprudential history, it has

been assumed that due process principles protect us from sexual assaults of the kind at issue here.

Unlike the majority, I believe that the very fact that the assumption is so widely held assists in establishing and making specific the constitutional right to be free from invasions of bodily integrity under color of law. The majority's criticism that "[t]hese broad statements are not supported by precedent indicating that a general constitutional right to be free from sexual assault is part of a more abstract general right to 'bodily integrity'" is also misplaced. Because the "literally outrageous abuses of official power," *Hall v. Tawney*, 621 F.2d at 613, that occasion resort to the protections of substantive due process rights are so varied, articulation or listing of the precise actions that would justify reliance on such constitutional principles is difficult. Sexual assault, however, must be considered one of the most blatant and serious invasions of the protected right to bodily integrity. If such intrusions are not plainly within the scope of protection offered by the "general right," it is difficult to imagine what other acts could be so included.

In short, I can think of no more clearly established and specific, constitutionally-based, due process principle than one which recognizes, albeit necessarily through analogous factual situations, that judicial officials cannot wield their power over child-custody decisions, employment decisions, and other court matters so as to coerce compliance through sexual assaults and other interferences with the rights of bodily integrity of litigants, applicants, and other individuals before the court. An analysis of applicable case law, both from the Supreme Court and from our sister circuits, leads to the inescapable conclusion

that, at the time of Lanier's assaults upon his victims, a constitutional right to freedom from interference with bodily integrity that shocks the conscience had been made specific by those decisions.

### C. Examination of Specificity of Notice to Defendant

In its final attacks upon the validity of Lanier's § 242 convictions, the majority insists that reliance upon a constitutional right defined in terms of a "shocks the conscience" standard is so vague as to fail to place the defendant on notice of the acts which are criminalized. The majority also insists that use of such a standard allows the judiciary to extend the reach of the crime which should be defined by congressional action only.

Under time-honored jurisprudential principles, however, we, as an intermediate appellate court, are bound to defer to relevant precedent from the Supreme Court on this issue. In *Screws*, a decision from which the Supreme Court has not retreated, that Court rejected the very argument advanced by the majority and concluded that the standard of guilt in § 242 is *not* unconstitutionally vague if the statute is read to require of the defendant "a specific intent to deprive a person of a federal right made definite by decision or other rule of law." *Id.* at 103. As long as "the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law." *Id.* at 102; *United States v. Reese*, 2 F.3d at 881.

The majority, nevertheless, intimates that Lanier could not have been aware that sexually assaulting women in his chambers when they arrived to conduct

official business with him constituted a violation of the victims' due process rights. In light of historical explications of individual rights and liberties and the unanimity of federal courts addressing analogous circumstances, however, it is clear that the defendant in this case either knew or acted "in reckless disregard of [§ 242's] prohibition of the deprivation of a defined constitutional or other federal right." *Screws v. United States*, 325 U.S. at 104. The prohibitions of the statute are not, therefore, so vague that the defendant could not have realized, prior to commission of his reprehensible acts, that those deeds were criminalized by § 242.

Finally, the majority argues that use of a "shocks the conscience" standard to determine whether particular acts should be criminalized "places unparalleled, unprecedented discretion in the hands of federal law enforcement officers, prosecutors and judges." The vesting of such discretion in juries, judges, and law enforcement officials is not, however, unheard of in the criminal law. For example, one must assume that in order to maintain a consistent, intellectually honest stance on this particular matter of contention, the majority now stands ready to invalidate state pornography statutes visiting criminal sanctions upon individuals violating even less definite "contemporary community standards" of decency. See *Miller v. California*, 413 U.S. 15, 24, 30-33 (1973). Regardless of the inherent difficulties in defining such "community standards," however, we continue to place great confidence in the ability of American judges, juries, prosecutors, and the public at-large to discern readily those violations of substantive due process principles that are so egregious and demeaning as to shock the conscience of the courts. Conse-

quently, I find no constitutional impediments to the prosecution of the defendant in this case under the facts presented to us on appeal.

I recognize that we have consistently determined that use of a "shocks the conscience" standard is problematic in areas other than cases involving the use of excessive force or physical abuse. *See, e.g., Pusey v. City of Youngstown*, 11 F.3d 652, 657 (6th Cir. 1993), *cert. denied*, 114 S.Ct. 2742 (1994); *Mansfield Apartment Owners Assoc. v. City of Mansfield*, 988 F.2d 1469, 1478 (6th Cir. 1993); *Braley v. City of Pontiac*, 906 F.2d 220, 226 (6th Cir. 1990). This case, however, does not fall outside those boundaries. In all the instances of misconduct for which the defendant was punished, he clearly exerted not only the force of his office and position within the community, but also physical force to exact compliance with his perverted sense of acceptable office behavior. Such physical assaults, committed within the judge's own chambers, upon individuals with cases under his jurisdiction, upon individuals hired or appointed by him, and upon individuals dependent upon him for the proper functioning and stability of public programs, do, as explicitly found by the jury, shock the public conscience. The use of a "shocks the conscience" standard under these facts, therefore, is eminently justified, even under prior circuit precedent. Moreover, as the Supreme Court stated in *Screws*:

We hesitate to say that when Congress sought to enforce the Fourteenth Amendment in this fashion it did a vain thing. We hesitate to conclude that for [130] years this effort of Congress, renewed several times, to protect the important rights of the individual guaranteed by

the Fourteenth Amendment has been an idle gesture. Yet if the Act falls by reason of vagueness so far as due process of law is concerned, there would seem to be a similar lack of specificity when the privileges and immunities clause and the equal protection clause of the Fourteenth Amendment are involved.

325 U.S. at 100 (citations omitted).

### III.

At least since the sealing of Magna Carta in 1215, Anglo-American jurisprudence has recognized the right of citizens to be free from interference with their bodily integrity, except under the clear authority of law. Today, however, the majority turns its back on 780 years of history on this subject.

The court inexplicably concludes that an individual has no recognized due process right to be free from sexual assault by a judge who is able to effect those assaults solely by his position and by his power over the jobs and families of the victims. Presumably, the majority would have no qualms in reaffirming the principle that prisoners have a constitutional right not to be assaulted by, or at the direction of, their jailers. *See United States v. Price*, 383 U.S. at 793; *Screws v. United States*, 325 U.S. at 106-07; *United States v. Brummett*, 786 F.2d 720 (6th Cir. 1986).<sup>3</sup> That same majority, however, can now find that the commensurate right to freedom from a willful sexual assault at the hands of a sitting judge has not been

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<sup>3</sup> Interestingly, Brummett was also indicted for and pled guilty to an 18 U.S.C. § 241 conspiracy charge involving a sexual assault upon another jail inmate. *United States v. Brummett*, 786 F.2d at 721.

"made specific" by prior court decision, solely because no Supreme Court case has yet explicitly involved a factual situation with a judge who so dishonored his profession or who sunk to such levels of depravity as has the defendant in this case. I cannot condone such a startling restriction of basic personal rights and liberties.

Every court that has addressed an analogous inquiry has found it beyond dispute that our constitution protects us from willful, conscience-shocking intrusions and assaults upon our bodily integrity under color of law. Because I believe that the actions of the defendant in this case clearly fall within the constitutional prohibitions made specific by such prior case law and of which all reasonable individuals should be aware, I choose to align myself with those opinions holding sacred our most basic human liberties. For that same reason, I unhesitatingly dissent from the majority's attempt to withdraw recognition of that right.

# APPENDIX B

## UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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No. 93-5608

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

*v.*

DAVID W. LANIER, DEFENDANT-APPELLANT

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[Filed: Aug. 31, 1994]

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Before: KEITH and MILBURN, Circuit Judges; and  
WELLFORD, Senior Circuit Judge.

MILBURN, Circuit Judge, delivered the opinion of the court, in which KEITH, Circuit Judge, joined. WELLFORD, Senior Circuit Judge (p. 666 [141a]), delivered a separate concurring opinion.

MILBURN, Circuit Judge.

Defendant David W. Lanier appeals his jury convictions, and the sentences imposed thereon, of seven counts of the willful deprivation under color of law of the civil rights of various female individuals in violation of 18 U.S.C. § 242. On appeal, the issues are (1) whether the government proved the essential elements of 18 U.S.C. § 242 beyond a reasonable doubt; (2) whether the district court abused its discretion in refusing to sever the trials of the charges against defendant; (3) whether the district court erred in

refusing to dismiss the indictment on the ground that it failed to give notice to the defendant of the charges he was required to defend; (4) whether the district court erred in refusing to dismiss the indictment on the ground that the statute, 18 U.S.C. § 242, was impermissibly vague; (5) whether the district court erred in excluding evidence concerning the prior sexual activity and prior drug use of one of the witnesses, Vivian Archie; (6) whether the district court abused its discretion in refusing to grant a one-day continuance of the trial because a local newspaper containing a story about the case was found in the jury room prior to the commencement of the trial; (7) whether the district court erred in failing to grant a mistrial based upon the prosecutor's opening statement; (8) whether the prosecutor committed prosecutorial misconduct in his closing argument by improperly vouching for prosecution witnesses, making inflammatory statements, and calling the defendant names; (9) whether the defendant was denied a fair trial by prosecutorial misconduct throughout the trial process; (10) whether the jury instructions were improper and prejudicial; (11) whether the district court erred in enhancing defendant's sentence for obstruction of justice under United States Sentencing Guideline ("U.S.S.G.") § 3C1.1; (12) whether the district court erred in imposing a fine and costs of incarceration; (13) whether the district court erred in determining defendant's base offense level; (14) whether the sentence imposed by the district court was disproportionate to the offenses under the Eighth Amendment; and (15) whether the district court erred in refusing to depart downward from the applicable sentencing

guidelines under U.S.S.G. § 5K2.0. For the reasons that follow, we affirm.

# I.

On May 20, 1992, a federal grand jury indicted defendant on 11 counts of violating 18 U.S.C. § 242. At the time of the indictment, defendant was the elected chancery court judge for Dyer and Lake Counties in Tennessee, where he also served as juvenile court judge. As the only chancellor and juvenile court judge in said counties, all of the employees of each of the courts, including secretaries, clerks, and juvenile officers, worked at the pleasure of defendant Lanier.

The indictment alleged that between 1988 and 1991, defendant sexually assaulted eight women who either worked for him at the state chancery court, worked for or with him in the juvenile court of Dyer County, or had a case pending before defendant. Count 1 of the indictment alleged that in July 1988, defendant, acting under color of state law, sexually assaulted Patricia Wallace,<sup>1</sup> an employee of the Circuit Court of Dyer County, depriving her of her liberty without due process; namely, the right to be free of sexual assault. The indictment alleged that defendant willfully touched Wallace on and near her crotch and otherwise molested her.

Counts 2 and 3 of the indictment similarly alleged that during the period from May to August 1989, defendant sexually assaulted Sandra Sanders, an employee of the Dyer County Juvenile Court. The

<sup>1</sup> In view of all the publicity surrounding the trial of this matter from the various media and the fact that the record was not filed under seal, we have used the victims' names herein. We would not have done this had the circumstances been otherwise.

indictment alleged that defendant willfully grabbed Sanders' breasts and buttocks and otherwise molested her.

Counts 4 and 5 of the indictment similarly alleged that in either September or October 1990, defendant sexually assaulted Patty Mahoney, an employee of the Chancery Court of Dyer County. The indictment alleged that defendant willfully grabbed Mahoney's breasts and buttocks, touched his pelvis to her body, and otherwise molested her.

Counts 6 and 7 of the indictment likewise alleged that in September 1990 (Count 6) and again in October 1990 (Count 7) defendant sexually assaulted Vivian Archie by willfully coercing her to engage in sexual acts with defendant Lanier, which resulted in bodily injury to her. Count 8 of the indictment also similarly alleged that during the period from February through May 1991, defendant sexually assaulted Sandy Attaway, an employee of the Chancery Court of Dyer County, by willfully touching his pelvis to her buttocks and otherwise molesting her.

Similarly, count 9 of the indictment alleged that in either February or March 1991, defendant sexually assaulted Ruby Sipes by willfully exposing his genitals to her and urging her to engage in sexual acts with him. Count 10 of the indictment similarly alleged that in April 1991, defendant sexually assaulted Lisa Couch by willfully coercing her to engage in sexual acts with him, resulting in bodily injury to her. Finally, count 11 of the indictment similarly alleged that in September 1991, defendant assaulted Fonda Bandy by willfully grabbing her breasts and crotch, and otherwise molesting her.

Defendant's trial began on November 30, and concluded on December 16, 1992. The evidence

presented at trial showed that defendant was born in Dyer County, Tennessee, and had lived there virtually all his life. Defendant is from a politically prominent family. He served as alderman and mayor of Dyersburg, Tennessee, before first being elected Chancery Court Judge of the Twenty-Ninth Judicial District in 1982. Defendant was reelected in 1990. He continued to serve as a chancery court judge until he was removed from his position pending resolution of this case.

As a chancery court judge, defendant principally presided over divorces, probate matters, and boundary disputes. Although the circuit court also has concurrent jurisdiction along with chancery court over divorce cases, defendant presided over 80 to 90 percent of the divorce cases in Lake and Dyer Counties, including child support and other matters related to the divorce cases. Further, as earlier stated, defendant also served as juvenile court judge in said counties.

In 1989, defendant hired Sandy Sanders to be the Youth Service Officer of the Dyer County Juvenile Court. Sanders was to supervise the Youth Service Office. During her job interview, defendant told Sanders that he had sole hiring authority for the Youth Service Officer position. Defendant also had the authority to fire the Youth Service Officer.

As part of her job duties, Sanders was required to have weekly meetings with defendant to review the work performed by her office. During one of these weekly meetings, which occurred in defendant's chambers, defendant got up from his desk, sat beside Sanders in a chair, and, during their conversation, grabbed and squeezed her breast. Sanders became

upset and tried to remove defendant's hand; however, defendant told her not to be afraid.

Sanders left the meeting as quickly as possible. She did not tell anyone about what had occurred because she thought that no one would believe her since defendant was a judge and was influential in the community. Subsequently, Sanders telephoned defendant and told him she needed to meet with him. She went to defendant's chambers, told him she did not appreciate his actions, and received an apology from him.

Sanders continued to have weekly meetings with defendant. However, after she confronted him about his actions, he began complaining about the quality of her work, and, eventually, he took away her supervisory authority. Sanders testified that she believed defendant took away her supervisory authority in retaliation for her confrontation with him. She testified that she considered quitting her job, but she remained in her position because she believed she was helping the children she worked with.

Defendant testified that he was often alone with Sanders in his chambers; however, he denied ever touching her breast. He testified that prior to the alleged incident, he and Sanders would hug and kiss each other as a friendly greeting. Defendant testified that he stopped such behavior after Sanders told him she was no longer comfortable hugging him.

In the fall of 1990, defendant hired Patty Mahoney to be his secretary. Mahoney was recently divorced and had two young children to support. Mahoney understood that defendant was her supervisor and had the power to fire her. Mahoney was uncomfortable with defendant because she felt that he had inappropriately hugged her during her job interview. How-

ever, she accepted the job because, for a person without a college degree, it was a good job in Dyersburg.

Mahoney testified that she worked for defendant for two weeks, but she quit when it became apparent that he was not going to leave her alone. She testified that while she worked in defendant's chambers, he would hug her or touch her on her breasts or buttocks. By the second day of her employment, defendant began to firmly place his hands on her breasts.

Mahoney testified that defendant eventually became more aggressive, grabbing and squeezing her breasts, rather than just placing his hands on them. She confronted him about his behavior, but he told her that if she reported his behavior it would hurt her more than it would hurt him. Mahoney testified that since the Lanier family was so powerful, she thought that no one would hire her if she reported defendant's behavior.

Despite her confrontation with defendant and her efforts to avoid being alone with defendant, the touching and grabbing of Mahoney's breasts continued on a daily basis. After deciding she would quit, Mahoney telephoned defendant from her home and informed him of her decision. Mahoney went to work the next day and met with defendant in his chambers. She broke down crying, telling him that she needed the job and wanted him to leave her alone. At that point, defendant put his arms around her, lifted her off the floor, and aggressively hugged her. Then, with one hand on the lower part of Mahoney's back, defendant slid her down his body and pressed his pelvis against her. That same night, Mahoney called defendant and told him she was quitting. She worked one more week because she needed the job.

Dinah Rone, a friend of Mahoney's, testified that during a meeting she had with Mahoney, Mahoney became distraught and told Rone that defendant would not keep his hands off her. Rone testified that Mahoney also told her that when she told defendant she was going to quit her job, he picked her up and rubbed his body against her.

At trial, defendant denied that he ever touched Mahoney in a sexual manner or grabbed either her breasts or buttocks. However, defendant testified that he and Mahoney hugged every day.

Vivian Archie grew up in Dyersburg and was acquainted with the Lanier family. She married in 1988 and gave birth to a daughter. She was divorced the following year. Defendant presided over her divorce proceedings and awarded the custody of her daughter to her.

In 1990, Archie was out of work and living with her parents. Archie learned that a job was available at the courthouse. She went to the courthouse, filled out an application for a secretarial position, and met with defendant in his chambers. At the outset of their meeting, defendant told Archie that her father had come to see him that day. Defendant said that Archie's father had told him that she was not a good mother, and he wanted custody of her child.

Archie became frightened and asked defendant if he was going to take her daughter away from her. Defendant told her that he could not talk about it because he was the judge who would preside over any such case. Defendant then told Archie that he had already promised the job to someone else. Archie replied that she needed the job and would do anything to get a job. She testified that she stated this be-

cause, otherwise, defendant would have leverage to take her child away.

When Archie was ready to leave, she reached across the desk to shake defendant's hand. At that point, defendant grabbed her hand, pulled her around to the end of his desk, and grabbed her hair and neck. When Archie told defendant to stop and tried to push him away, he twisted her neck and tried to fondle her. Defendant kept pulling Archie's hair and neck, and, finally, he turned around and threw her into a chair. Defendant then tried to kiss her, and each time she tried to get away, he would squeeze her neck harder. Finally, defendant stood over Archie, exposed his penis, and pulled her head down and her jaws open. He then forced his penis into her mouth and moved his pelvis back and forth with great force. Archie testified that this hurt her throat and jaw.

Defendant did not stop until he had ejaculated in Archie's mouth. Archie, who was crying, got up and went into defendant's bathroom to clean her mouth and face so that she could leave the courthouse. Archie testified that when she got home, her head was tender where defendant had pulled her hair; her neck was sore, and when she brushed her hair where defendant had pulled it, some of her hair fell out. Archie also testified that she did not scream when defendant attacked her or report the incident because she was afraid he would take custody of her child from her.

A few weeks later, defendant telephoned Archie's residence and told her mother he had a job for her. Defendant did not tell Archie's mother where the job interview would be located. Rather, he told her mother that Archie would have to come by his chambers to get the information. Archie was reluc-

tant to call defendant; however, at her mother's insistence, she returned his telephone call. Although Archie repeatedly asked defendant to tell her where the job interview was, he insisted that she return to his chambers for the information. Archie then returned to defendant's chambers believing that if she did not, her parents would be furious with her and defendant would believe that she had told her parents about the assault.

When she arrived at defendant's chambers, he told her about a secretarial position in the office of Dr. Lynn Warner. Archie told defendant she knew where Dr. Warner's office was located because he had been her doctor since she was a child. While they were talking, defendant walked around his desk towards Archie. She tried to get out of the room, but he slammed the door closed and began kissing her. She told him to stop, but he began pulling her hair and threw her into a chair. As she was saying "no," defendant again exposed himself, turned her head, pulled her mouth open, and forced her to perform oral sex. During this period, defendant continued to grab Archie by the hair, squeeze her neck and shoulders, and pull her head back, all of which caused her great pain. Archie also testified that during this period she was crying, gagging, choking, and having trouble breathing. Defendant again ejaculated in her mouth. She ran crying into his bathroom and cleaned up her mouth and face so that she could go to her job interview.

Archie did not report either of the assaults because her child custody case had been in defendant's court, and she was afraid that defendant would take her daughter away from her. Archie testified that she subsequently met with defendant and that he asked

her if she had said anything to anyone and also asked why she had not been back to see him. Defendant then asked Archie how her family life was going. Archie testified that she interpreted defendant's remarks to mean that he would permit her to keep custody of her daughter if she did not tell anyone what had happened.

At trial, defendant acknowledged that he was alone with Archie in his chambers on both of the occasions mentioned in her testimony, but he denied ever assaulting her or having oral sex with her. He testified that Archie came to him looking for a job and he told her he did not have one available, but he would let her know if he learned of one. He also admitted telling Archie that he had met her father and that her father wanted to know how to go about getting custody of Archie's daughter.

Defendant admitted that he told Dr. Warner that Archie needed a job and that he set up an interview for her with Dr. Warner. Defendant also admitted that he told Archie to come to his chambers so he could tell her where the interview was. Defendant testified that Archie did come to his chambers and that he sent her to Dr. Warner for the interview.

Dr. Warner testified as a defense witness. He testified that Archie never told him that defendant forced her to have sex with him. On cross-examination, Warner testified that Archie did tell him that defendant requested oral sex and that she performed oral sex. Dr. Warner also testified on cross-examination that he discussed Archie with defendant, and defendant told him that Archie might be willing to provide sexual favors. As a result, Warner agreed to interview Archie for the job.

On the day of the job interview and after the second alleged assault, defendant telephoned Warner to tell

him that Archie was on her way to see him. During their telephone conversation, defendant told Warner that Archie would do "anything" for a job. This was a prearranged signal from defendant to Dr. Warner that Archie was willing to perform sexual favors. Warner testified that after defendant said the magic words, Archie came in for an interview and he hired her.

Leigh Ann Johnson, defendant's daughter, testified for the defense. Johnson testified that she had known Vivian Archie all of her life and that Archie was a pathological liar. Colleen Fleming, a friend of Archie, also testified for the defense. Fleming testified that after both of the sexual assaults were alleged to have occurred, she had a conversation with Archie, and during this conversation, Archie stated that she had never had sex with defendant.

In addition, seven other witnesses testified for the defense. These witnesses were: Donna Forsythe McDevitt, Archie's sister; Larry Johnson; Keith Underwood; Kathy Walker; Heather Willis; Stewart Green; and Delta Willis. All of these witnesses testified that they had known Archie for a lengthy period of time and that she had a reputation for untruthfulness in the community.

In March 1991, defendant hired Sandy Attaway, age 26, to be his secretary. After her first month of work, defendant began making sexual comments to Attaway. He told Attaway that he would loan her money and they could work out a payment. He also asked Attaway what she would do for him if he let her off from work. Finally, defendant told Attaway that he knew how he could relieve her stress and she could relieve his. Attaway believed these comments referred to sex.

Defendant also asked Attaway if she were afraid of him. She testified that she told him "no," although that was untrue, because she did not want him to think she was weak and could be intimidated. Defendant told Attaway that he was a judge, and everyone should be afraid of him.

Defendant then went from sexual comments to physical contact with Attaway. He began hitting her on the buttocks when she walked by him. Further, when Attaway was in defendant's chambers to have him sign some papers, he walked around behind her and threw his arms around her. Defendant then pushed his pelvic area into Attaway's buttocks and began making a grinding motion. She could tell that defendant's penis was erect because she felt him rubbing it against her. Attaway then yelled at defendant to stop. He told her to lower her voice because there were people in the courtroom, and defendant was afraid they would hear Attaway.

Attaway testified that she told her cousin, Tina Brock, about the incident. Brock testified that, over the telephone, Attaway told her that defendant had come up behind her and rubbed his pelvic area into her buttocks.

Attaway did not quit after the assault because she needed the job. However, three months later, defendant terminated Attaway on the ground that things were not working out. Attaway testified that she saw defendant at the courthouse after he had terminated her, and defendant told her they would have gotten along fine if she had liked to have oral sex.

Defendant testified regarding Attaway's allegations. He denied sexually assaulting her in any way.

In the fall of 1991, Fonda Bandy met with defendant in his chambers concerning her work for a federal

program, Drug Free Public Housing. Bandy wanted to implement a new program of parenting classes for parents who lived in public housing and had children before the juvenile court. Since defendant was the juvenile court judge, Bandy arranged a presentation about the program for him. She hoped that he would refer parents to her program as part of their children's sentencing.

After Bandy's presentation, defendant asked her some questions about the program. Defendant then began asking Bandy personal questions, such as whether or not she was married.

Bandy testified that when she began to leave defendant's chambers, he put his arms around her and started kissing her. As she tried to turn and pull away, defendant put one of his hands behind her head and pulled her up to him. Defendant then began to fondle one of Bandy's breasts and she tried to push him away. When she eventually pulled herself free, Bandy saw that defendant had lipstick all over him.

Bandy was shaken and panicked, and she went into the bathroom to clean herself up before leaving defendant's chambers. After she left the bathroom, Bandy had to walk past defendant's desk to exit his chambers. As she walked by, defendant, who was sitting on the end of his desk nearest the door, reached out and put his hand on Bandy's crotch. Bandy momentarily hesitated and then kept on walking towards the door. Defendant followed her to the door and told her that if she came back, she would have all the clients that she wanted for her new program.

Bandy testified that she never returned to see defendant because she did not want to have to go through that kind of treatment again. Defendant only referred two individuals to Bandy's program. These

two individuals had cases pending before defendant at the time of his meeting with Bandy, and defendant and Bandy had discussed their cases. Bandy testified that she did not report the incident with defendant because he was a judge and she did not want too many people to know about it.

Defendant testified and admitted that he had met with Bandy alone in his chambers. He denied ever sexually assaulting Bandy. Defendant also testified that after their meeting, Bandy came over to him and hugged and kissed him.

At the close of the trial, the district court granted defendant's motion for a judgment of acquittal on count 9 of the indictment. On December 18, 1992, the jury found defendant not guilty on counts 1, 3, and 10 of the indictment. However, the jury returned guilty verdicts on counts 2, 4, 5, 6, 7, 8, and 11 of the indictment.

Sentencing hearings were held on March 26 and April 12, 1993. On April 12, 1993, defendant was sentenced to one year's imprisonment on each of counts 2, 4, 5, 8, and 11. Defendant was sentenced to ten years' imprisonment on each of counts 6 and 7. Defendant's sentence on each count was to be served consecutively to the others, resulting in a total sentence of 25 years' imprisonment. Defendant's sentence was to be followed by two years of supervised release, and he was ordered to pay a fine of \$25,000. Further, defendant was ordered to pay, as costs of incarceration, \$1,492 per month during the period of his incarceration, provided that he was entitled to receive and did receive a pension from the State of Tennessee. This timely appeal followed.

## II.

## A.

Defendant argues that the government failed to prove all the necessary elements of a violation of 18 U.S.C. § 242 beyond a reasonable doubt. Specifically, he asserts that the government failed to show that he was acting under color of law when he assaulted his victims, that the government failed to show he acted willfully, that the government failed to show that his actions denied the constitutional rights of his victims, and that the government failed to show that Vivian Archie suffered any bodily injury.

Sufficient evidence exists to support a conviction if, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could accept the evidence as establishing each essential element of the crime. *See Jackson v. Virginia*, 443 U.S. 307, 324, 99 S.Ct. 2781, 2792, 61 L.Ed.2d 560 (1979). Title 18 U.S.C. § 242 (1969 & Supp.1994) states:

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than \$1,000 or imprisoned not more than one year, or both; and if bodily injury results shall be fined under this title or imprisoned not more than

ten years, or both; and if death results shall be subject to imprisonment for any term of years or for life.

Defendant first argues that the government did not establish that he deprived the victims of a constitutional right. In his brief on appeal, defendant acknowledges that at trial he took the position that "freedom from sexual assault" was a recognized constitutional right. He states, however, that after further research and consideration he has changed his position on appeal. Brief of Appellant at 18-19. Nevertheless, although defendant asserts that after research and consideration he has determined that freedom from sexual assault is not a recognized right, he cites no authority for this proposition in his brief.<sup>2</sup>

In *Screws v. United States*, 325 U.S. 91, 105, 65 S.Ct. 1031, 1037, 89 L.Ed. 1495, (1945) the Supreme Court stated that

willful violators of constitutional requirements, which have been defined, certainly are in no position to say that they had no adequate advance notice that they would be visited with punishment. When they act willfully in the sense in which we use the word, they act in open defiance

<sup>2</sup> The First Circuit has stated that where a defendant makes a passing reference to an issue, but "presents no reasoned discussion of, or analysis addressed to, the . . . issue," the matter is ended. *Cook v. Rhode Island*, 10 F.3d 17, 21 (1st Cir.1993). The First Circuit also stated that it firmly adheres to the principle "that issues adverted to on appeal in a perfunctory manner, not accompanied by some developed argumentation, are deemed to have been abandoned." *Id.* (internal quotations omitted). We adopt the reasoning of the First Circuit.

or in reckless disregard of a constitutional requirement which has been made specific and definite.

Thus, the decision in *Screws* established "that once a due process right has been defined and made specific by court decisions, the right is encompassed by § 242." *United States v. Hayes*, 589 F.2d 811, 820 (5th Cir.), cert. denied, 444 U.S. 847, 100 S.Ct. 93, 62 L.Ed.2d 60 (1979).

In this case, the government established that the defendant, a State of Tennessee judge, violated the victims' constitutional right; namely, their right to bodily integrity. Further, the right to bodily integrity has been defined and made specific by court decision. "[T]he right to be free of state-occasioned damage to a person's bodily integrity . . . [is] protected by the [F]ourteenth [A]mendment guarantee of due process, and the [F]ourth [A]mendment guarantee of [T]he right of . . . people to be secure in their persons, made applicable to the states by the [F]ourteenth [A]mendment." *Jamieson v. Shaw*, 772 F.2d 1205, 1210 (5th Cir.1985) (citations and quotations omitted). "It is settled now . . . that the Constitution places limits on a State's right to interfere with a person's . . . bodily integrity." *Canedy v. Boardman*, 16 F.3d 183, 185 (7th Cir.1994) (quoting *Planned Parenthood v. Casey*, — U.S. —, —, 112 S.Ct. 2791, 2806, 120 L.Ed.2d 674 (1992)).

Individuals also have a "historic liberty interest . . . encompass[ing] freedom from bodily restraint and punishment." *Ingraham v. Wright*, 430 U.S. 651, 673-74, 97 S.Ct. 1401, 1413-14, 51 L.Ed.2d 711 (1977). Although the contours of this historic liberty interest have not been precisely defined, one aspect of this

liberty interest is the right of personal security protected by the Fourth Amendment. *Id.* The overriding function of the Fourth Amendment is to "protect personal privacy and dignity against unwarranted intrusion by the State." *Id.* at 673 n. 42, 97 S.Ct. at 1413 n. 42 (quoting *Schmerber v. California*, 384 U.S. 757, 767, 86 S.Ct. 1826, 1834, 16 L.Ed.2d 908 (1966)). This historic liberty interest is violated when a state actor sexually assaults, or sexually molests, anyone. *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 451 (5th Cir.1994) (en banc), pet. for cert. filed, No. 93-1918 (June 1, 1994).<sup>3</sup>

The record in this case shows that the evidence was sufficient with regard to each count of conviction to establish that defendant sexually assaulted the victims. Since the victims had a constitutionally protected right not to be sexually assaulted by a state actor, defendant deprived them of their constitutional rights.

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<sup>3</sup> In examining the issue as to whether defendant in this case violated a constitutional right, we also look to civil cases arising under 42 U.S.C. § 1983, even though this is a criminal prosecution under 18 U.S.C. § 242. As the Ninth Circuit has stated:

There is thus nothing wrong with looking to a civil case brought under 42 U.S.C. § 1983 for guidance as to the nature of the constitutional right whose alleged violation has been made the basis of a section 242 charge. The protections of the Constitution do not change according to the procedural context in which they are enforced—whether the allegation that constitutional rights have been transgressed is raised in a civil action or in a criminal prosecution, they are the same constitutional rights.

*United States v. Reese*, 2 F.3d 870, 884 (9th Cir.1993), cert. denied, — U.S. —, 114 S.Ct. 928, 127 L.Ed.2d 220 (1994). See also *United States v. Bigham*, 812 F.2d 943, 948 (5th Cir.1987).

Second, defendant argues that if his convictions are upheld by this court, "any unwanted sexual touching . . . [can] become[ ] the trigger for [a] serious federal crime." Brief of Appellant at 27. However, the district court instructed the jury that:

Freedom from such physical abuse includes the right to be free from certain sexually motivated physical assaults and coerced sexual battery. It is not, however, every unjustified touching or grabbing by a state official that constitutes a violation of a person's constitutional rights. The physical abuse must be of a serious and substantial nature that involves physical force, mental coercion, bodily injury or emotional damage which is shocking to one's conscience.

J.A. 884-85. Juries are presumed to follow the court's instructions. *Zafiro v. United States*, — U.S. —, —, 113 S.Ct. 933, 939, 122 L.Ed.2d 317 (1993). Thus, it is clear from the record and the trial court's instructions that the jury did not convict defendant merely because of "unwanted sexual touching."

Third, defendant argues that the government failed to show that he acted willfully. In *Screws*, the Court held that the reference to willfulness in § 242 requires proof of a specific intent or purpose "to deprive a person of a federal right made definite by decision or other rule of law." *Screws*, 325 U.S. at 103, 65 S.Ct. at 1036. It is not material whether or not the defendant was thinking in constitutional terms; rather, a defendant acts willfully when he "act[s] in open defiance or in reckless disregard of a constitutional requirement which has been made specific and definite." *Id.* at 105, 65 S.Ct. at 1037. See *United*

*States v. O'Dell*, 462 F.2d 224, 232 n. 10 (6th Cir.1972) (accord).

The proof in this case established that defendant intentionally engaged in wrongful conduct, not by mistake or accident, each time he assaulted one of his victims. Moreover, each time defendant assaulted one of his victims, he acted in defiance and disregard of her constitutional right to bodily integrity, namely, her right to be free from sexual assault. Further, there is evidence in the record which shows that either prior to or after the assaults, defendant took steps to coerce or intimidate his victims into silence. From this evidence, a reasonable juror could infer that defendant knew his actions in assaulting his victims were wrong. Accordingly, we conclude that the evidence amply shows that defendant acted willfully in this case.

Fourth, defendant argues that the government failed to show that he was acting under color of law at the time he assaulted his victims. An act is under color of law when it constitutes a "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *United States v. Tarpley*, 945 F.2d 806, 809 (5th Cir.1991) (quoting *United States v. Classic*, 313 U.S. 299, 326, 61 S.Ct. 1031, 1043, 85 L.Ed. 1368 (1941)), cert. denied, — U.S. —, 112 S.Ct. 1960, 118 L.Ed.2d 562 (1992). "[U]nder 'color' of law [also] means under 'pretense' of law." *Id.* (quoting *Screws*, 325 U.S. at 111, 65 S.Ct. at 1040). "Acts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it," but, "acts of officers in the ambit of their personal pursuits are plainly excluded." *Screws*, 325 U.S. at 111, 65 S.Ct. at 1040. "[I]ndi-

viduals pursuing private aims and not acting by virtue of state authority are not acting under color of law purely because they are state officers." *Tarpley*, 945 F.2d at 809.

Defendant argues that his actions in this case were personal pursuits. However, the jury correctly concluded that defendant's actions in this case were taken under color of state law. First, all of the assaults took place in defendant's chambers during working hours, and during each assault, there was at least an aura of official authority and power. Three of the victims, Sandy Sanders, Patty Mahoney, and Sandy Attaway, were present in defendant's chambers because they were working for him. On the first occasion Vivian Archie was assaulted, she had gone to defendant's chambers to apply for a secretarial position. On the second occasion Archie was assaulted, defendant used his continuing authority to determine custody of her child to coerce her into returning to his office. Finally, Fonda Bandy was assaulted while she was present in defendant's chambers to make a presentation about her parenting classes for juvenile offenders.

Further, there was evidence that defendant used his position to intimidate his victims into silence. Prior to the first assault, defendant told Archie that her father wanted to know how he could go about seeking custody of her child. Defendant was also able to coerce Archie back into his office a second time because he knew she needed a job in order to ensure that she would keep custody of her child.

Defendant also used his position to effectively demote Sandy Sanders after he assaulted her. He told Sandy Attaway that she should be afraid of him because he was a judge, and he fired her after he

assaulted her. Defendant also told Patty Mahoney that it would hurt her more than it would hurt him if she told anyone about his assault. Finally, after assaulting Fonda Bandy, defendant told her that he would see to it that she got all of the clients she needed for her parenting classes if she would come back to see him.

Consequently, the government presented sufficient evidence for a rational juror to decide that defendant was acting under color of state law and not merely for his own personal pursuits when he assaulted the victims. Moreover, contrary to defendant's assertions, the government did not establish that he acted under color of state law based merely upon the subjective impressions of his victims. The government presented considerable objective evidence, as described above, which supported the jury's conclusion that defendant acted under color of state law.

Furthermore, we wish to emphasize that his case involves much more than a defendant who is a mere public official. Rather, this case involves a state judge who committed various abhorrent and unlawful sexual acts in his chambers, oftentimes while wearing his judicial robe. We consider such egregious misconduct on the part of defendant to be shocking to the conscience of the court.

Finally, defendant argues that Vivian Archie did not suffer bodily injury. Counts 6 and 7 charged that defendant's assaults of Vivian Archie resulted in her suffering bodily injury. Under 18 U.S.C. § 242, bodily injury makes the sexual assault a felony, punishable by up to ten years' imprisonment.

Defendant argues that the district court wrongly instructed the jury on the meaning of bodily injury. Defendant did not, however, object to the jury

instruction at trial. Thus, the court's instruction will be reviewed only for plain error. See *United States v. Thomas*, 11 F.3d 620, 629 (6th Cir.1993), cert. denied, — U.S. —, 114 S.Ct. 1570, 128 L.Ed.2d 214 (1994).

The district court instructed the jury that

bodily injury means any injury, no matter how temporary. Bodily injury also includes physical pain as well as any burn, cut, abrasion, bruise, disfigurement, illness or impairment of a bodily function.

J.A. 886-87. Defendant argues that the district court should have used the definition of serious bodily injury from 18 U.S.C. § 247(e)(2). However, 18 U.S.C. § 242 does not require serious bodily injury; it only requires bodily injury. Moreover, although bodily injury is not defined in § 242, it is defined in four other provisions of Title 18 of the United States Code. In these four provisions, Congress gave the term bodily injury the same meaning, providing that bodily injury includes "a cut, abrasion, bruise, burn, or disfigurement," "physical pain," "illness," "impairment of a function of a bodily member, organ or mental faculty," or "any other injury to the body, no matter how temporary." See 18 U.S.C. §§ 831(f)(4), 1365(g)(4), 1515(a)(5), 1864(d)(2). The jury instructions given by the district court are consistent with the definitions of bodily injury used in Title 18. Further, in *United States v. Myers*, 972 F.2d 1566, 1572-73 (11th Cir.1992), cert. denied, — U.S. —, 113 S.Ct. 1813, 123 L.Ed.2d 445 (1993), the Eleventh Circuit held that jury instructions in a § 242 prosecution which defined bodily injury as "injury to the body, no matter how temporary, . . . includ[ing] physical pain as well as any

burn or abrasion," were not erroneous. Accordingly, the district court's jury instructions on bodily injury were not plain error. See *United States v. Olano*, — U.S. —, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993).

Finally, defendant argues that there was insufficient evidence that Archie suffered bodily injury. However, Archie's testimony at trial was sufficient to establish that after both assaults she suffered bodily injury as defined above, beyond a reasonable doubt.

#### B.

Defendant argues that the district court abused its discretion in failing to grant his pretrial motion to sever the trial of the three felony counts from the eight misdemeanor counts charged in the indictment. Defendant asserts that he was prejudiced because of the district court's failure to grant a severance. He argues that if the two charges involving Vivian Archie, counts 6 and 7, had been tried separately, he would have been acquitted of those charges because Archie's testimony lacked credibility.

A motion for severance pursuant to Federal Rule of Criminal Procedure 14 is committed to the sound discretion of the trial court. *United States v. McCoy*, 848 F.2d 743 (6th Cir.1988). A defendant making a motion for severance under Rule 14 has the burden of demonstrating a strong showing of prejudice. *United States v. Goldman*, 750 F.2d 1221, 1225 (4th Cir.1984). "To show enough prejudice to require severance, a defendant must establish 'substantial prejudice,' 'undue prejudice,' or 'compelling prejudice.'" *United States v. Warner*, 971 F.2d 1189, 1196 (6th Cir.1992) (citations omitted). Further, it is not enough to justify a severance for a defendant to show that joinder has made his defense more difficult or that

separate trials might have offered him a better chance of acquittal. *Goldman*, 750 F.2d at 1225.

In this case, the district court did not abuse its discretion in denying defendant's motion for severance because defendant failed to establish either substantial, undue, or compelling prejudice. Accordingly, this issue is meritless.

### C.

Defendant argues that the district court erred in failing to dismiss the indictment on the ground that the charges contained in the indictment were impermissibly vague. Defendant asserts that although each misdemeanor count in the indictment alleged a specific act of defendant, the counts also referred to allegations that he otherwise molested the victims, which was not adequate notice of the charges against him.

An indictment is sufficient if it contains the elements of the offense charged and fairly informs a defendant of the charges against which he must defend. *Allen v. United States*, 867 F.2d 969, 971 (6th Cir.1989) (citing *Hamling v. United States*, 418 U.S. 87, 117, 94 S.Ct. 2887, 2907, 41 L.Ed.2d 590 (1974)). The courts use a common sense approach in determining whether an indictment sufficiently informs a defendant of an offense. *Id.* "The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it . . . sufficiently apprises the defendant of what he must be prepared to meet . . . ." *United States v. Debrow*, 346 U.S. 374, 376, 74 S.Ct. 113, 114, 98 L.Ed. 92 (1953) (quoting *Cochran v. United States*, 157 U.S. 286, 290, 15 S.Ct. 628, 630, 39 L.Ed. 704 (1895)).

In this case, each count in the indictment was sufficient to inform the defendant of the charges against him. Furthermore, although the misdemeanor allegations in the indictment did use the language "and otherwise molested," this language clearly did not prejudice defendant's ability to defend himself at trial because he was able to obtain an acquittal on four of the eleven charges in the indictment. Moreover, in his brief on appeal, defendant acknowledges that in the indictment, the government put him on notice of at least one specific act in each count of the indictment, and the government's case was directed to establishing the specific or particular acts charged in the indictment. Thus, defendant clearly had notice of the charges against him, and, as stated, defendant was able to mount a successful defense to some of those charges.

At trial, defense counsel objected to the admission of evidence that defendant otherwise molested his victims. For instance, with regard to Sandy Sanders, one of the government's witnesses, the court admitted Sanders' testimony that defendant had grabbed her and kissed her. In counts 2 and 3 of the indictment defendant was charged with willfully grabbing Sanders' breasts and buttocks. Defendant argues that this evidence should not have been admitted under Federal Rule of Evidence 404(b) and that he should have been given notice that the government intended to seek admission of this testimony. However, Rule 404(b) was not implicated. "An act is not extrinsic, and Rule 404(b) is not implicated, where the evidence of that act and the evidence of the crime charged are inextricably intertwined." *United States v. Torres*, 685 F.2d 921, 924 (5th Cir.1982) (per curiam). Here, the evidence that defendant grabbed

and kissed Sanders is inextricably intertwined with the evidence that defendant grabbed her breasts and buttocks, because all three acts were part of an ongoing pattern in which defendant sexually assaulted Sanders. Thus, the district court did not err in admitting Sanders' testimony and similar testimony of defendant's other victims. Further, defendant has not shown that he was prejudiced in any manner by the alleged lack of notice that the government would use this testimony.

#### D.

Defendant argues that the statute, 18 U.S.C. § 242, is void for vagueness. One of the basic principles of due process is that a statute can be void for vagueness if its prohibitions are not clearly defined. *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298-99, 33 L.Ed.2d 222 (1972). In *Screws v. United States*, 325 U.S. 91, 104, 65 S.Ct. 1031, 1037, 89 L.Ed. 1495 (1945), the Supreme Court held that 18 U.S.C. § 242 was not unconstitutionally vague if it were read to require "an intent to deprive a person of a right which has been made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them." Further, in rejecting the vagueness challenge to § 242, the Court ruled that "a requirement of a specific intent to deprive a person of a federal right made definite by decision or other rule of law saves [§ 242] from any charge of unconstitutionality on the grounds of vagueness." *Id.* at 103, 65 S.Ct. at 1036.<sup>4</sup> Thus,

<sup>4</sup> *Screws* interpreted the text of 18 U.S.C. § 242 as it was written in 1942. Section 242 was amended in 1968; however, the 1968 amendments did not render the statute unconstitutionally

*Screws* established "that once a due process right has been defined and made specific by court decisions, the right is encompassed by § 242." *United States v. Hayes*, 589 F.2d 811, 820 (5th Cir.), *cert. denied*, 444 U.S. 847, 100 S.Ct. 93, 62 L.Ed.2d 60 (1979).

In this case, the due process right of the victims, their right to bodily integrity which defendant violated, has been defined and made specific by court decisions. See *Jamieson v. Shaw*, 772 F.2d 1205, 1210 (5th Cir. 1985); *Canedy v. Boardman*, 16 F.3d 183, 185 (7th Cir. 1994). Accordingly, the right of the victims violated by defendant in this case is encompassed by § 242. Therefore, defendant's argument that the statute is unconstitutionally vague is meritless.

#### E.

Defendant argues that the district court abused its discretion by limiting his counsel's cross-examination of one of the government's witnesses, Vivian Archie. Specifically, defendant asserts that the district court abused its discretion when (1) it limited cross-examination of Archie concerning her prior sexual conduct and (2) it limited cross-examination of Archie concerning her prior drug use.

Beyond the essentials of cross-examination, the district court in the exercise of its discretion can limit the right to cross-examination. *Dorsey v. Parke*, 872 F.2d 163, 166 (6th Cir.), *cert. denied*, 493 U.S. 831, 110 S.Ct. 103, 107 L.Ed.2d 67 (1989). An abuse of discretion is found where the trial court has interfered with a defendant's constitutional right to cross-examination. *Id.* However, where the trial

vague. *United States v. Hayes*, 589 F.2d 811, 819-20 (5th Cir.), *cert. denied*, 444 U.S. 847, 100 S.Ct. 93, 62 L.Ed.2d 60 (1979).

court curtails the defendant's cross-examination of the government's "star" witness, its ruling must be more carefully scrutinized. *United States v. Brown*, 946 F.2d 1191, 1195-96 (6th Cir.1991).

If the cross-examination "reveals sufficient information to appraise the witnesses' veracity," the Sixth Amendment right to confront witnesses is satisfied. *Dorsey*, 872 F.2d at 167 (quoting *United States v. Falsia*, 724 F.2d 1339, 1343 (9th Cir.1983)). "[T]he bounds of the trial court's discretion are exceeded when the defense is not allowed to 'plac[e] before the jury facts from which bias, prejudice or lack of credibility of a prosecution witness might be inferred[.]'" *Id.* (quoting *United States v. Garrett*, 542 F.2d 23, 25 (6th Cir.1976)).

Here, the district court's decision to limit cross-examination of Archie concerning her prior sexual conduct was not an abuse of discretion. "[A]bsent circumstances which enhance its probative value, evidence of a rape [or sexual assault] victim's unchastity, whether in the form of testimony concerning her general reputation or direct or cross-examination testimony concerning specific acts with persons other than the defendant, is ordinarily insufficiently probative either of her general credibility as a witness or of her consent to intercourse with the defendant on the particular occasion charged to outweigh its highly prejudicial effect." *United States v. Kasto*, 584 F.2d 268, 271-72 (8th Cir.1978) (footnotes omitted), *cert. denied*, 440 U.S. 930, 99 S.Ct. 1267, 59 L.Ed.2d 486 (1979).

In addition, Federal Rule of Evidence 608(b) states in relevant part:

Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, . . . in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness

. . . . .

Furthermore, Fed.R.Evid. 412(b) also limits the admissibility of evidence concerning the past sexual behavior of a victim in a criminal case in which the defendant is accused of a sexual offense.

Thus, the testimony which the defense sought to elicit during cross-examination of Vivian Archie would simply have been an attack on Archie's character. Accordingly, the district court did not err in limiting Archie's testimony concerning her past sexual conduct.

Further, the district court did not abuse its discretion in limiting cross-examination of Archie concerning her prior drug use. "A witness' use of drugs is only relevant as to the ability of the witness to perceive the underlying events and testify lucidly at trial." *Jarrett v. United States*, 822 F.2d 1438, 1445 (7th Cir.1987). In this case, the defense did elicit testimony from Archie admitting that she was heavily involved with drugs both before and after the assaults by defendant. Further, Archie testified that she did not use drugs and was not under the influence of drugs at the time of either of the two assaults by the defendant. Moreover, Archie was able to clearly

perceive the events underlying both of the assaults and to testify lucidly about them at trial. Finally, despite the district court's limitation of the cross-examination of Vivian Archie concerning her prior drug use, the jury was not under the impression that she was a model citizen. Not only did Archie admit that she was a long-term drug addict, but the defense also put on seven witnesses who testified as to her reputation for untruthfulness. Accordingly, the district court's limitation of cross-examination concerning Archie's prior drug use was not an abuse of discretion.

#### F.

Defendant argues that he was denied his right to an impartial or fair jury. Prior to trial, the parties and the court learned that a copy of a local newspaper containing an article about the case had been left in the jury room. Defendant argues that as a result of the presence of the newspaper in the jury room, the court should have excused the jury panel and permitted the selection of a new jury panel. Defendant also asserts that the court should have permitted an individual voir dire of the jury panel.

"[T]he jury's verdict [must] be based on evidence received in open court, and not from outside sources." *Sheppard v. Maxwell*, 384 U.S. 333, 351, 86 S.Ct. 1507, 1516, 16 L.Ed.2d 600 (1966). A new trial is not required merely because the jury has been exposed to material not in evidence. Rather, a new trial is required only when a reasonable possibility exists that the material affected the jury's verdict. *United States v. Weisman*, 736 F.2d 421, 424 (7th Cir.), cert. denied, 469 U.S. 983, 105 S.Ct. 390, 83 L.Ed.2d 324 (1984); *United States v. Hill*, 688 F.2d 18, 19 (6th Cir.)

(per curiam), cert. denied, 459 U.S. 1074, 103 S.Ct. 498, 74 L.Ed.2d 638 (1982). Such a determination depends upon the particular facts of each case, with the critical factor being the degree and pervasiveness of the prejudicial influence possibly resulting from the jury's exposure to the extraneous material. *Weisman*, 736 F.2d at 424. This court reviews a trial court's determination of prejudice for an abuse of discretion. *Id.* Furthermore, "[i]n considering the effect of . . . extra-judicial material on the jury the District Court has a large discretion in ruling on the issue of prejudice resulting from the reading by jurors of news articles concerning the trial." *United States v. Van Dyke*, 605 F.2d 220, 229 (6th Cir.), cert. denied, 444 U.S. 994, 100 S.Ct. 529, 62 L.Ed.2d 425 (1979). The Supreme Court has

stressed the wide discretion granted to the trial court in conducting *voir dire* in the area of pretrial publicity and in other areas of inquiry that might tend to show juror bias. Particularly with respect to pretrial publicity, we think this primary reliance on the judgment of the trial court makes good sense. The judge of that court sits in the locale where the publicity is said to have had its effect, and brings to his evaluation of any such claim his own perception of the depth and extent of news stories that might influence a juror.

*Mu'Min v. Virginia*, 500 U.S. 415, 427, 111 S.Ct. 1899, 1906, 114 L.Ed.2d 493 (1991).

In this case, the district court permitted a voir dire of the jurors and did not find prejudice sufficient to delay the trial and obtain a new jury panel. Although defendant argues that the district court should have

had a sequestered voir dire of the jurors, defendant has not identified any prejudice resulting from the district court's action. Accordingly, the district court did not abuse its discretion.

G.

Defendant argues that the district court abused its discretion in denying his motion for a mistrial based on alleged factual misstatements in the government's opening statement. "In order to deny a defendant a fair trial, prosecutorial misconduct and improper argument must be 'so pronounced and persistent that it permeate[d] the entire atmosphere of the trial.'" *United States v. Castro*, 908 F.2d 85, 89 (6th Cir.1990) (quoting *United States v. Vance*, 871 F.2d 572, 577 (6th Cir.), cert. denied, 493 U.S. 933, 110 S.Ct. 323, 107 L.Ed.2d 313 (1989)). "Inappropriate remarks by the prosecutor do not alone justify reversal of a criminal conviction in an otherwise fair proceeding, as long as the jury's ability to judge the evidence fairly remains intact." *Id.* (citing *United States v. Young*, 470 U.S. 1, 11-12, 105 S.Ct. 1038, 1044, 84 L.Ed.2d 1 (1985)). "In order to decide if the prosecutor's remarks denied the defendant a fair trial, a reviewing court may consider, along with other factors, the potential of the remarks to prejudice the defendant or confuse the jury and the strength of proof against the defendant." *Id.* (citing *Angel v. Overberg*, 682 F.2d 605, 608 (6th Cir.1982)). Furthermore, in reviewing the prosecutor's remarks and argument, this court must remember the Supreme Court's statement that in his arguments "the prosecutor could 'strike hard blows but not foul ones.'" *United States v. Steinkoetter*, 633 F.2d 719, 720 (6th Cir.1980) (quoting *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935)).

In this case, however, defense counsel did not object to the prosecutor's opening statement until the day after the statement was made. Accordingly, this court's review is limited to plain error, see *United States v. Levy*, 904 F.2d 1026, 1029-1030 (6th Cir.1990), cert. denied, 498 U.S. 1091, 111 S.Ct. 974, 112 L.Ed.2d 1060 (1991), using the standard enunciated by the Supreme Court in *United States v. Olano*, — U.S. —, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993).

Nevertheless, regardless of which standard is used, the district court did not err in denying defendant's motion for a mistrial. Defendant claims that the government did not present any evidence supporting some of the remarks made by the prosecutor during his opening statement. He asserts that the government failed to offer any proof supporting the prosecutor's statement that the jury would hear that defendant masturbated in front of some of the victims. However, Ruby Sipes testified that while she was present in defendant's chambers, "he had both hands on his penis and he was masturbating." J.A. 714. Defendant also challenges the prosecutor's statement that if defendant did not like the women who worked for him, he would terminate them and they would lose their livelihood. However, Sandy Attaway testified that defendant fired her because "things just weren't working out between us." J.A. 435.

Defendant further argues that the prosecutor's description of defendant's conversation with Vivian Archie's father concerning her father's desire to obtain custody of Archie's baby was unsupported by the evidence. However, Archie and defendant testified about this conversation. Defendant further challenges the prosecutor's description of Fonda Bandy's parenting program. However, Bandy not only

testified about her parenting program, she also testified that due to defendant's position as a juvenile court judge, defendant was the only person who could make her parenting program a success.

Defendant also challenges the prosecutor's statement that he was the only judge that an individual in Dyer County could go to for a divorce, child support, or child custody case.<sup>5</sup> Defendant correctly points out that witnesses testified that the circuit judge could also hear such cases. Nevertheless, defendant testified that although he and the circuit judge had concurrent jurisdiction over divorce cases and related proceedings, he heard approximately 80 to 90 percent of the divorce cases and that if he heard a divorce case he would follow it through to the end, including child custody and child support matters as well. This testimony shows that even though the prosecutor's remarks were technically inaccurate, the broad proposition that the prosecutor was trying to make was correct; namely, for all practical purposes, defendant was likely to preside over a divorce proceeding and related matters in Dyer County.

Accordingly, the prosecutor's remarks during his opening statement did not deprive defendant of a fair trial. Therefore, the district court did not err in denying defendant's motion for a mistrial based upon the prosecutor's opening statements.

#### H.

Defendant argues that the prosecutor made improper comments during his closing argument and

<sup>5</sup> Defendant did immediately object to this statement by the prosecutor.

that these comments deprived him of a fair trial. Defense counsel did not object to the prosecutor's closing argument at the time of the argument. However, he did object to certain phraseology used by the prosecutor the day after the prosecutor's argument. Where, as here, a defendant fails to make a contemporaneous objection to the prosecutor's comments, a conviction will stand absent a finding of plain error. *United States v. Cummins*, 969 F.2d 223, 227 (6th Cir.1992); *Levy*, 904 F.2d at 1030. In reviewing alleged prosecutorial misconduct for plain error, "it is necessary that the error be measured not within the narrow confines of the [prosecutor's] argument but against the entire record." *United States v. Ebens*, 800 F.2d 1422, 1438 (6th Cir.1986). Under Federal Rule of Criminal Procedure 52(b), a court of appeals should correct a plain error if the error, "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *United States v. Olano*, — U.S. —, —, 113 S.Ct. 1770, 1779, 123 L.Ed.2d 508 (1993) (quoting *United States v. Atkinson*, 297 U.S. 157, 160, 56 S.Ct. 391, 392, 80 L.Ed. 555 (1936)).

Defendant first asserts that the prosecutor improperly vouched for the credibility of the government's witnesses. "Improper vouching occurs when a jury could reasonably believe that a prosecutor was indicating a personal belief in a witness' credibility." *Taylor v. United States*, 985 F.2d 844, 846 (6th Cir.1993) (per curiam) (citing *United States v. Causey*, 834 F.2d 1277, 1283 (6th Cir.1987), cert. denied, 486 U.S. 1034, 108 S.Ct. 2019, 100 L.Ed.2d 606 (1988)). During closing argument, the prosecutor told the jury:

And you need to make a credibility evaluation, there is no question about that. It really [is] a question of whether [defendant] is telling the truth or these women are telling the truth. And you know, that is why you are here. That is why you get to look at the witnesses when they are testifying, because you have to decide who is telling the truth. You look at their demeanor, their facial expressions, look at their body language and use your common sense. You listen to what they say, did it make sense. Are they telling you the truth or are they making it up. And you can compare the demeanor of [defendant] on that stand with the way the women looked on the stand.

J.A. 850-51. Defendant's assertion of improper vouching by the prosecutor is meritless.

Second, defendant asserts that the prosecutor improperly challenged his credibility. However, defendant took the witness stand and expressly testified that the testimony of the government witnesses was false. A prosecutor has reasonable latitude in fashioning his closing arguments, and in a case involving two essentially conflicting stories, it is reasonable to infer, and to argue, that one side is lying. *United States v. Molina*, 934 F.2d 1440, 1441 (9th Cir.1991); see also *Whittington v. Estelle*, 704 F.2d 1418, 1422 (5th Cir.), cert. denied, 464 U.S. 983, 104 S.Ct. 428, 78 L.Ed.2d 361 (1983). In this case, the prosecutor's comments to the jury about the conflicts in the testimony and whether they should believe defendant's version or the victims' version was simply fair comment on the evidence presented at trial.

Third, defendant asserts that the government argued facts not in evidence when the prosecutor stated that defendant "called in every political favor in the county to get people to come in here and say things about [the victims]." J.A. 865. This statement by the prosecutor was a reference to the fact that many of the 23 defense witnesses were called in to attack the credibility of the government's witnesses. Indeed, the prosecutor's next statements to the jury were "does anybody not have somebody that doesn't like them? Does anybody have somebody that wouldn't come in and say, 'You're a liar.'" J.A. 865-66.

Finally, defendant argues that the prosecutor's statement to the jury that if it believed that what defendant did was not against the law, the jury should "go back there, mark 'not guilty' on that [verdict] form ten times, and let [defendant] start court next week," was improper. J.A. 864. However, there is nothing improper about this or the above statements.

#### I.

Defendant also argues that the government engaged in persistent misconduct throughout the entire trial process. As noted previously, prosecutorial misconduct warrants reversal of a conviction only if, based upon a review of the record as a whole, it "permeates the entire atmosphere of the trial." *United States v. Dandy*, 998 F.2d 1344, 1352 (6th Cir.1993), cert. denied, — U.S. —, 114 S.Ct. 1188, 127 L.Ed.2d 538 (1994). However, defendant has not shown any persistent misconduct of the government which permeated the atmosphere of his trial.

Defendant argues that the government improperly named his two original attorneys as possible wit-

nesses to prevent them from representing him. However, the district court rejected this argument as baseless, and defendant has pointed to no facts which would cast doubt upon the district court's decision. Further, a review of the record shows that defendant was ably represented at trial.

Defendant next contends that Dr. Louise Fitzgerald, an expert psychologist, was improperly permitted to remain in the courtroom with some of the victims and also met with and comforted some of the victims after their testimony. However, Fitzgerald did not testify as a witness at the trial.<sup>6</sup> Since Fitzgerald was not a witness at the trial before the jury, her presence in the courtroom was neither improper nor did it deprive defendant of a fair trial.

Defendant further asserts that the government subpoenaed Colleen Fleming to be a witness, but when she told the government that Vivian Archie had told her that she (Archie) had never had sex with defendant, she was not called as a witness and the government told her (Fleming) not to speak to anyone. Defendant asserts that the government improperly withheld this information from the defense. However, defendant acknowledges that he learned that the government had subpoenaed Fleming and, in fact, the defense presented Fleming as a witness at the trial. Fleming testified that Archie did tell her that she had never had sex with defendant. Therefore, defendant was not prejudiced by the alleged failure to disclose.

Defendant also asserts that an FBI agent involved with the case, Agent Castleberry, improperly invaded

the witness room prior to trial when he removed a box of Kleenex tissues from the witness room. Agent Castleberry apparently entered the witness room to obtain the box of Kleenex tissues for one of the witnesses who had become upset. When Castleberry entered the room, a defense witness, Joan Lanier, was in the room. Castleberry either said "Hi" or "Hello" to Mrs. Lanier as he picked up the tissue box. Mrs. Lanier claimed that she was intimidated by Castleberry's actions as well as by the fact that she thought the Kleenex box might have contained a listening device. In this case, there is no evidence that the Kleenex box ever contained a listening or tape recording device. Further, there is no evidence that Agent Castleberry's momentary intrusion into the witness room so intimidated Mrs. Lanier as to deprive defendant of a fair trial.

Defendant also asserts that the government acted improperly when it called him to testify before the grand jury which was investigating the case, even though he had previously indicated that he would exercise his Fifth Amendment privilege against self-incrimination if called before the grand jury. Defendant twice appeared before the grand jury on March 5, 1992, and May 20, 1992. Defendant was advised of his rights to invoke the Fifth Amendment privilege against self-incrimination on both occasions, and he invoked the privilege on both occasions. At the second hearing on May 20, 1992, defendant was asked about a subpoena for audio and video tapes which the grand jury had earlier issued. Previously, the defendant had turned over some tapes to the grand jury and had indicated that he thought one more tape might exist. At this second grand jury appearance, he testified that the grand jury had all the tapes which

<sup>6</sup> It appears, however, that Fitzgerald may have testified at the hearing on defendant's motion for a mistrial.

existed. Defendant then invoked the Fifth Amendment privilege and refused to give any further testimony.

The mere "subpoenaing of the defendant before the grand jury is not per se a violation of his constitutional rights or a ground for dismissal of the indictment." *United States v. Bell*, 351 F.2d 868, 874 (6th Cir.1965), *cert. denied*, 383 U.S. 947, 86 S.Ct. 1200, 16 L.Ed.2d 210 (1966). Moreover, defendant was aware that he could assert his Fifth Amendment privilege during the grand jury proceedings, and he did so. Furthermore, the defendant's statement that he had turned over all the evidence subpoenaed by the grand jury was neither inculpatory nor exculpatory. Accordingly, this issue is meritless.

Defendant also asserts that the government used the testimony of Lisa Couch at trial even though the government knew that her testimony was highly suspect. Defendant had surreptitiously tape-recorded a conversation he had with Couch. The jury heard Couch's testimony and the tape. Further, defendant was acquitted of the count involving Lisa Couch.

Defendant next asserts that the government's conduct was outrageous because the government threatened, harassed, and intimidated potential witnesses in an attempt to affect their testimony. Along with his motion to dismiss the indictment on the ground of outrageous government conduct, defendant submitted several affidavits from potential witnesses. After reviewing the affidavits, the district court found that they did not support defendant's claim of outrageous governmental conduct. Moreover, despite his unsupported claim that the government attempted to coerce potential witnesses, defendant was able to present numerous witnesses at trial and to obtain

acquittal on four of the charges against him. Thus, defendant's claim of outrageous governmental conduct was meritless.

Finally, defendant asserts that the government unlawfully intercepted telephone calls he made using his cordless telephone. Although the government claimed that it acted lawfully in intercepting the cordless telephone calls, it nevertheless agreed not to use the tape recordings of the cordless telephone conversations at trial. Thus, defendant's trial was not prejudiced by the government's interception of his cordless telephone calls.

#### J.

Defendant argues that the district court's jury instructions were improper. Specifically, defendant asserts that the district court improperly instructed the jury on the issue of consent. The district court instructed the jury that

[f]or the physical contact to be unlawful, it must have been unauthorized and not due to the free and voluntary consent of the alleged victim. It is for you to determine whether any such conduct occurred by reason of uncoerced and voluntary consent.

J.A. 885. During its deliberations, the jury sent a note to the judge asking what role implied consent played in the defendant's willfully depriving the victims of their rights. Defendant then asked that a further instruction to the effect that consent is a complete defense to any assault, whether the consent is express or implied, be given to the jury. The district court did not give this instruction, and defendant asserts that this was error.

"The standard on appeal for a court's charge to the jury is whether the charge, taken as a whole, fairly and adequately submits the issues and applicable law to the jury.'" *United States v. Buckley*, 934 F.2d 84, 87 (6th Cir. 1991) (quoting *United States v. Martin*, 740 F.2d 1352, 1361 (6th Cir.1984)).

In this case, the district court's jury instructions adequately submitted the issues and law to the jury. Moreover, the instructions on the issue of consent were correct, and the district court did not err in declining to give the instruction requested by the defendant. Further, "the trial judge is given substantial latitude in tailoring the [jury] instructions," and "neither party, including a criminal defendant, may insist upon any particular language." *United States v. Saussy*, 802 F.2d 849, 853 (6th Cir.1986) (quoting *United States v. James*, 576 F.2d 223, 226-27 (9th Cir.1978)), *cert. denied*, 480 U.S. 907, 107 S.Ct. 1352, 94 L.Ed.2d 522 (1987).

#### K.

Defendant argues that the district court erred in enhancing his offense level by two levels for obstruction of justice under United States Sentencing Guideline ("U.S.S.G.") § 3C1.1. The district court found that the obstruction of justice enhancement was applicable because defendant had committed perjury at trial. Specifically, the district court stated:

I am required to make a finding with respect to whether the defendant committed perjury relative to a material fact while testifying under oath in this case with willful intent to provide false testimony. Given the defendant's testimony at this trial and the testimony that was to the contrary, provided by the various victims in this

case, with respect to those counts on which there was a verdict of guilty, I cannot make any finding by a preponderance of the evidence other than that the defendant testified under oath falsely with the willful intent to provide false testimony as to material issues or matters, and I so find. I make that finding without direct reliance on the verdict of the jury in this case and based on my evaluation of the evidence.

J.A. 947-48.

U.S.S.G. § 3C1.1 provides:

If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense level by 2 levels.

In *United States v. Dunnigan*, — U.S. —, —, 113 S.Ct. 1111, 1116, 122 L.Ed.2d 445 (1993), the Supreme Court stated that a "witness testifying under oath or affirmation" commits perjury "if [he] gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake or faulty memory." The Supreme Court further stated that at sentencing, if a defendant objects to a sentence enhancement for perjury under U.S.S.G. § 3C1.1 based upon his trial testimony, "a district court must review the evidence and make independent findings necessary to establish a willful impediment to or obstruction of justice, or an attempt to do the same, under the perjury definition we have set out." *Id.* at —, 113 S.Ct. at 1117. The Court further stated that in making its findings "it is preferable for a district

court to address each element of the alleged perjury in a separate and clear finding. The district court's determination that enhancement is required is sufficient, however, if . . . the court makes a finding of an obstruction or impediment of justice that encompasses all of the factual predicates for a finding of perjury." *Id.*

A district court retains discretion in deciding whether a defendant's actions constitute an obstruction of justice under the guidelines, and this court reviews the district court's decision under an abuse of discretion standard. *United States v. Medina*, 992 F.2d 573, 591 (6th Cir.1993), *cert. denied*, — U.S. —, 114 S.Ct. 1049, 127 L.Ed.2d 371 (1994). In deciding whether a defendant's testimony at a criminal trial constituted perjury, the district court may not rely on the jury's finding of guilt, but, rather, must make findings of its own. *Mathews v. United States*, 11 F.3d 583, 587 (6th Cir.1993). However, once a district "court makes a finding that a defendant 'testified untruthfully as to a material fact while under oath,' the district court [has] no discretion under the Sentencing Guidelines in applying § 3C1.1." *United States v. Morgan*, 986 F.2d 151, 153 (6th Cir.1993) (*per curiam*) (quoting *United States v. Alvarez*, 927 F.2d 300, 303 (6th Cir.), *cert. denied*, 500 U.S. 945, 111 S.Ct. 2246, 114 L.Ed.2d 487 (1991)).

Defendant first argues that the district court failed to make proper findings to support the obstruction enhancement. In this case, the district court found that defendant testified falsely under oath with the willful intent to provide false testimony as to material matters. Further, the district court also explicitly stated that its conclusion was based upon its own evaluation of the evidence and not the jury's verdicts.

Given the fact that defendant testified that none of the alleged sexual assaults occurred, the district court's finding of obstruction of justice was not an abuse of discretion. Defendant's testimony that none of the alleged assaults occurred clearly concerned a material matter, and since the testimony utterly contradicted the victims' testimony, it was clearly made with the intent to provide false testimony. Thus, the district court's finding of obstruction of justice "encompass[ed] all the factual predicates for a finding of perjury." *Dunnigan*, — U.S. at —, 113 S.Ct. at 1117. Therefore, the district court's finding of obstruction of justice comports with *Dunnigan*.

Second, defendant asserts that the district court erred in believing that it lacked the discretion not to apply the enhancement. However, once the district court made the required finding that the defendant had committed perjury, it was required to apply the enhancement under U.S.S.G. § 3C1.1.

#### L.

Defendant first argues that the district court erred in imposing a fine of \$25,000. He asserts that the district court erred in imposing the fine because he did not have the funds to pay it.

U.S.S.G. § 5E1.2(a) requires courts to impose fines in all cases, except where the defendant establishes that he is unable to pay and is not likely to become able to pay any fine. In determining the amount of the fine, the court is to consider, among other things, "any evidence presented as to the defendant's ability to pay the fine (including the ability to pay over a period of time) in light of his earning capacity and financial resources." U.S.S.G. § 5E1.2(d)(2). A defendant has the burden of showing that he is unable to

pay the fines imposed by the district court. *United States v. Vincent*, 20 F.3d 229, 240 (6th Cir.1994).

Although the presentence report noted that defendant had a negative net worth of \$83,835, the presentence report also noted that defendant's conviction and removal from the bench would not result in his losing his state pension of approximately \$1,500 to \$1,800 per month. Further, the presentence investigation report also noted that within the year prior to his conviction, defendant transferred a number of his properties to other persons.

A district court's findings concerning a defendant's ability to pay are factual findings which are subject to a clearly erroneous standard of review. *United States v. Hickey*, 917 F.2d 901, 905 (6th Cir.1990). Based upon the record, and the fact that defendant will likely be receiving a substantial state pension even during his incarceration, the district court's finding that defendant could pay a \$25,000 fine is not clearly erroneous.

Defendant also argues that the additional fine of \$1,492 per month imposed for the cost of imprisonment, which is to be paid so long as defendant is receiving a pension, is unlawful because it is not authorized by the Sentencing Reform Act. Although U.S.S.G. § 5E1.2(i) provides for the imposition of a fine for the costs of incarceration, defendant urges this court to follow the holding of the Third Circuit in *United States v. Spiropoulos*, 976 F.2d 155 (3d Cir.1992). In *Spiropoulos*, the Third Circuit concluded that the Sentencing Reform Act does not authorize a fine pursuant to U.S.S.G. § 5E1.2(i) for the cost of imprisonment. *Id.* at 165.

However, defendant did not make this argument to the district court, and, thus, this court need not

resolve the issue. See *United States v. Mondello*, 927 F.2d 1463, 1468 (9th Cir.1991) (Ninth Circuit refused to consider the issue of whether "the fine provisions of the Guidelines are contrary to statutory authority," where the argument was raised for the first time on appeal); see also *United States v. Carrozza*, 4 F.3d 70, 84 (1st Cir.1993) (where defendant did not raise issue concerning his cost of imprisonment fine before the district court, First Circuit would consider the issue only for plain error. Because the issue had resulted in conflicting decisions in other circuits, the district court's assessment of a cost of imprisonment fine is not plain error within the meaning of Fed.R.Crim.P. 52(b).), *cert. denied*, — U.S. —, 114 S.Ct. 1644, 128 L.Ed.2d 365 (1994).

Further, even if we were to consider the issue, the Third Circuit's decision in *Spiropoulos* is neither persuasive nor dispositive. The Seventh Circuit expressly rejected the Third Circuit's position in *United States v. Turner*, 998 F.2d 534 (7th Cir.), *cert. denied*, — U.S. —, 114 S.Ct. 639, 126 L.Ed.2d 598 (1993). Moreover, two other circuits had already reached a contrary decision prior to the decision in *Spiropoulos*. See *United States v. Hagmann*, 950 F.2d 175 (5th Cir.1991), *cert. denied*, — U.S. —, 113 S.Ct. 108, 121 L.Ed.2d 66 (1992); *United States v. Doyan*, 909 F.2d 412 (10th Cir.1990). Accordingly, we agree with the Fifth, Seventh, and Tenth Circuits and hold that the district court did not err in either of the fines it imposed.

#### M.

Defendant argues that the district court applied the wrong guideline in determining his offense level for the two felony counts, counts 6 and 7, which involved

Vivian Archie. Defendant asserts that with respect to counts 6 and 7, the district court should have used U.S.S.G. § 2A3.4, Abusive Sexual Contact, rather than the guideline it used, U.S.S.G. § 2A3.1, Criminal Sexual Abuse, to determine his offense level. Defendant asserts that U.S.S.G. § 2A3.1 is intended to apply to a crime of violence, and his assaults of Vivian Archie, counts 6 and 7, were not crimes of violence.

This court reviews "a district court's factual findings which underlie the application of a guideline provision for clear error." *United States v. Garner*, 940 F.2d 172, 174 (6th Cir.1991). However, whether the facts determined by the district court warrant the application of a particular guideline provision is a question of law which is reviewed de novo by this court. *Id.*

In this case, the district court found that 18 U.S.C. § 2241 was the underlying offense which most closely resembled the offense conduct in counts 6 and 7.<sup>7</sup> 18 U.S.C. § 2241(a)(1) defines aggravated sexual abuse, in relevant part, as "knowingly caus[ing] another person to engage in a sexual act . . . by using force against that other person." The term "sexual act" as defined in 18 U.S.C. § 2245(2)(B) includes oral sex. U.S.S.G.App. A., the statutory index, states that U.S.S.G. § 2A3.1 applies to violations of 18 U.S.C. § 2241.

<sup>7</sup> The district court was required to make this determination because U.S.S.G. § 2H1.4, the guideline provision applicable to violations of 18 U.S.C. § 242, the offense of conviction, stated that a defendant's base level is the greater of 10, or 6 plus the offense level applicable to any underlying offense. Since the offense level for the underlying offense for counts 6 and 7 as determined from U.S.S.G. § 2A3.1 was 27, this resulted in a base offense level of 33.

On the other hand, the statutory index states that U.S.S.G. § 2A3.4 applies to violations of 18 U.S.C. § 2244. 18 U.S.C. § 2244 defines abusive sexual contact in relevant part as "knowingly engag[ing] in or caus[ing] sexual contact with or by another person . . . ." The term "sexual contact" is defined in 18 U.S.C. § 2245(3) as "mean[ing] the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person."

Based upon the testimony of Vivian Archie, upon which defendant was convicted, defendant's actions in twice forcing Archie to perform oral sex on him constituted aggravated sexual abuse under 18 U.S.C. § 2241(a)(1) and not abusive sexual contact under 18 U.S.C. § 2244(a)(1). Accordingly, the district court did not err in determining that U.S.S.G. § 2A3.1 applied to counts 6 and 7.

#### N.

Defendant also argues that his sentence violated the Eighth Amendment because the total sentence imposed, 25 years, is disproportionate to the crimes committed. "[A]s a matter of principle . . . a criminal sentence must be proportionate to the crime for which the defendant has been convicted." *Solem v. Helm*, 463 U.S. 277, 290, 103 S.Ct. 3001, 3009, 77 L.Ed.2d 637 (1983). However, "[r]eviewing courts . . . should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals." *Id.*

Moreover, "[o]utside the context of capital punishment, *successful* challenges to the proportionality of particular sentences [will be] exceedingly rare." *Id.* at 289-90, 103 S.Ct. at 3009 (quoting *Rummel v. Estelle*, 445 U.S. 263, 272, 100 S.Ct. 1133, 1138, 63 L.Ed.2d 382 (1980)).

In *Harmelin v. Michigan*, 501 U.S. 957, 997, 111 S.Ct. 2680, 2702, 115 L.Ed.2d 836 (1991), the Supreme Court recognized that the Eighth Amendment "encompasses a narrow proportionality principle."<sup>8</sup> The plurality in *Harmelin* concluded that "the Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Id.* at 1001, 111 S.Ct. at 2705 (quoting *Solem*, 463 U.S. at 288, 303, 103 S.Ct. at 3008, 3016). Consequently, the *Harmelin* plurality concluded that "intra- and inter-jurisdictional analyses are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." *Id.* at 1005, 111 S.Ct. at 2707.

There is no inference of gross disproportionality between defendant's sentence and the crimes defendant committed. Defendant was convicted of seven out of the eleven counts in the indictment. These seven counts involved sexual assaults on five women, two of which were felony counts involving defendant's physically forcing a woman to perform oral sex on him on two occasions, resulting in bodily injury to her. Further, in committing these crimes, defendant

<sup>8</sup> In *United States v. Hopper*, 941 F.2d 419, 422 (6th Cir.1991), this court concluded that the plurality opinion in *Harmelin* was binding on the Sixth Circuit.

misused his power as a state judge to gain access to, as well as silence from, the victims, who were his employees, a worker in a juvenile program, or litigants before him. Thus, defendant's claim that his sentence of 25 years is so grossly disproportionate to the crime he committed as to suggest an Eighth Amendment violation has no merit.

#### O.

Finally, defendant argues that the district court erred in denying his motion for a downward departure under U.S.S.G. § 5K2.0. He asserts that the district court should have departed downward because this is not a "heartland" type of case, but an "atypical case." Brief of Appellant at 48.<sup>9</sup>

This issue is not appealable. "This Court has held that when the sentencing range is properly computed, the district court is aware of its discretion to depart, and the sentence is not imposed in violation of law or as the result of an incorrect application of the Sentencing Guidelines, a failure to depart is not a cognizable basis for appeal." *United States v. Isom*, 992 F.2d 91, 94 (6th Cir. 1993).

<sup>9</sup> In this case, the district court sentenced defendant to a sentence equal to the statutory maximum for the offenses of conviction, 25 years or 300 months. However, this sentence is actually less than the sentencing guideline range. Defendant's total offense level of 41 and his criminal history category, category I, result in a sentencing guideline range of 324 to 405 months' incarceration. Nevertheless, the district court sentenced defendant below the guideline range only because of the statutory maximum, not because it found any factors warranting a downward departure.

## III.

For the reasons stated, the district court is AFFIRMED in all respects.

WELLFORD, Senior Circuit Judge, concurring.

I concur in Judge Milburn's thorough analysis of this case. I write separately to emphasize several aspects of this case that are troubling to this panel member. Despite the fact that Judge Lanier's actions, as determined by the jury, were reprehensible, especially offensive, and inexcusable on the part of a judge, I have still examined this record with special care because it is an unusual *criminal* proceeding. We have found no other reported § 242 prosecutions involving a state judge, and we have found no other criminal cases involving charges of molestation, unconsensual touching, and, in general, sexual harassment of female adults typical in § 1983 or Title VII civil cases. Yet, no victim had brought, at the time of trial, any civil claim or charge against this defendant, perhaps because of fear, embarrassment, or understandable reluctance.

My first concern relates to defendant's request for severance of the two felony charges involving Vivian Archie from the other misdemeanor offenses.<sup>1</sup> The overwhelming impact of this case upon former Judge Lanier were these two felony offenses in Counts 6 and 7. Combining the numerous other much less serious offenses (based on the penalty involved) with these two offenses (Counts 6 and 7), in my view, undoubtedly impacted unfavorably and adversely upon defendant Lanier. The government had to know in advance of the indictment that, as the majority puts it and the government admitted in its brief, the chief prosecuting witness, Archie, was far from being a "model

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<sup>1</sup> The jury found defendant not guilty of the Count 10 felony offense involving Lisa Couch.

citizen." Archie had admitted drug problems and concededly granted sexual favors to the doctor friend of defendant. (Evidence of her general reputation was properly precluded at trial except for testimony from a number of witnesses who deemed her a liar.) I consider it to have been a close question as to whether there should have been a severance of Counts 6 and 7. Evidence of improper and unlawful touching, exposure, fondling and the like doubtless made the defense of these felony counts more difficult.

My concern is heightened by what I believe was an improper curtailment of cross-examination of Vivian Archie regarding her drug use. If she had, in fact, been under the influence of drugs at or about the time of the encounters set out in Counts 6 and 7, I believe it may well have reflected upon her credibility.

Although this may be a first criminal prosecution of this type, the instructions given by the district judge made it clear that "an unjustified touching" had to constitute "physical abuse . . . of a serious and substantial nature" involving "physical force, mental coercion, bodily injury or emotional damage which is shocking to one's conscience" to make out a constitutional violation. The district court made it clear that a great deal more than simple unwanted sexual touching must be proven to convict a state actor under § 242.

Most cases under § 242 have involved custodial situations—prison guards and officials, police or security officers, border guards, etc. The custody element is not present here and this absence has made this an unusual case.

Finally, I emphasize that there is a vast difference between a § 1983 civil prosecution of a defendant for unwanted sexual advances or harassment and a

criminal prosecution under § 242, not merely based upon the different burden of proof. Willful and intentional criminal conduct, which amounts to that which shocks the conscience, is far different from that conduct which the civil plaintiff charging a § 1983 violation must demonstrate to make out a case. See *United States v. Bigam*, 812 F.2d 943, 948 (5th Cir.1987).

Despite these reservations, I concur in the affirmation under all the circumstances set out in Judge Milburn's comprehensive opinion.

## APPENDIX C

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION

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CR. NO. 92-20172-TUBRO

UNITED STATES OF AMERICA, PLAINTIFF

v.

DAVID W. LANIER, DEFENDANT

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## ORDER ON PENDING MOTIONS

Defendant is charged with willfully depriving the alleged victims of their constitutional rights while acting under color of law in violation of 18 U.S.C. § 242. Presently before the court are defendant's motion to dismiss the indictment, motion to dismiss count ten of the indictment or to reduce the crime charged in that count to a misdemeanor, motion to sever for separate trials the offenses charged in the indictment, and motion to dismiss for outrageous government conduct. At oral argument on these motions, the court announced its ruling on the motion to dismiss count ten of the indictment or reduce the crime charged in count ten to a misdemeanor and on the motion to sever offenses for trial. The court announced that it would take under advisement the motion to dismiss the indictment because the statute is unconstitutionally vague and the motion to dismiss for outrageous government conduct. The court will address the merits of each of these motions in turn.

## I. Motion to Dismiss the Indictment

Defendant moves the court to dismiss the indictment on the ground that the statute under which the defendant is charged is unconstitutionally vague.<sup>1</sup> "The void-for-vagueness" doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Federal statutes are presumptively valid, *United States v. National Dairy Prod. Corp.*, 372 U.S. 29, 32 (1963), and "a defendant has the burden of establishing that the statute is vague as applied to conduct charged against him." *United States v. Busacca*, 739 F. Supp. 370, 378 (N.D. Ohio 1990), *aff'd*, 936 F.2d 232 (6th Cir.), *cert. denied*, 112 S. Ct. 595 (1991).

Defendant is charged with willfully depriving the alleged victims of their constitutional right not to be deprived of liberty without due process of law, including the right to be free from sexual assault.<sup>2</sup> See 18 U.S.C. § 242.<sup>3</sup> The Supreme Court has upheld

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<sup>1</sup> Although defendant appears to argue that the statute is *facially* vague, "vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand." *United States v. Powell*, 423 U.S. 87, 92 (1975). Since defendant's freedoms under the First Amendment are not implicated here, the court has considered whether the statute is unconstitutionally vague as applied.

<sup>2</sup> The defendant is also charged in Count 9 with depriving the alleged victim of the right to an unbiased tribunal.

<sup>3</sup> Section 242 provides in pertinent part:

the statute in question against challenges for vagueness, stating that "willful violators of constitutional requirements, which have been defined, certainly are in no position to say that they had no adequate advance notice that they would be visited with punishment." *Screws v. United States*, 325 U.S. 91, 105 (1945); *Williams v. United States*, 341 U.S. 97, 100 (1951); see also *United States v. Georvassilis*, 498 F.2d 883 (6th Cir. 1974) (upholding conviction for sexual assault under section 242); *United States v. Davila*, 704 F.2d 749 (5th Cir. 1983) (upholding conviction for sexual assault under section 242). Since section 242 proscribes only *willful* violations of *established constitutional rights*, it is not unconstitutionally vague. *Screws*, 325 U.S. at 104-05. "We do say that a requirement of a specific intent to deprive a person of a federal right made definite by decision or other rule of law saves the Act from any charge of unconstitutionality on the grounds of vagueness." *Id.* at 103.<sup>4</sup> Defendant's motion to dismiss the indictment on this ground is therefore denied.

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Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the constitution or laws of the United States . . . shall be fined not more than \$1,000 or imprisoned not more than one year, or both; and if bodily injury results shall be fined under this title or imprisoned not more than ten years, or both . . . .

18 U.S.C. § 242.

<sup>4</sup> Although the issue has not been raised, it is clear that existing law recognizes one's constitutional right to be free of coerced sexual acts such as intercourse or oral sex. See e.g., *Stoneking v. Bradford Area Sch. Dist.*, 856 F.2d 594 (3d Cir.

## II. Motion to Dismiss Count Ten of the Indictment or To Reduce Count Ten to a Misdemeanor

Count 10 of the indictment charges defendant with depriving Lisa Couch of her constitutional right to be free from sexual assault and thereby causing Ms. Couch bodily injury in violation of 18 U.S.C. § 242. If bodily injury results from a violation of section 242, the ordinary maximum penalty of one year imprisonment or a fine of \$100,000, or both, is increased to not more than 10 years' imprisonment or a maximum \$250,000 fine, or both.

Defendant submits as an exhibit to his motion a transcript of a tape-recorded conversation between defendant and Ms. Couch in which Ms. Couch allegedly denies that defendant caused her any physical injury. Defendant requests that the court either dismiss Count 10 of the indictment or reduce the count to a misdemeanor because the transcript allegedly contradicts the charge that defendant caused Ms. Couch bodily injury. Defendant cites no authority for such an action, and the court finds defendant's position to be without merit.

It is well-established that "[a]n indictment returned by a legally constituted and unbiased grand jury . . . if valid on its face, is enough to call for a trial of the charge on the merits." *Costello v. United States*, 350 U.S. 359, 363 (1956); *Lawn v. United States*, 355 U.S. 339, 348-50 (1958); *United States v.*

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1989), remanded on other grounds, 489 U.S. 1062, *aff'd*, 882 F.2d 720 (3d Cir. 1989), *cert. denied*, 493 U.S. 1044 (1990); *United States v. Davila*, 704 F.2d 749 (5th Cir. 1983); *Doe v. New York City Dept. of Social Servs.* 649 F.2d 134 (2d Cir. 1981); *Wedgeworth v. Harris*, 592 F. Supp. 155 (W.D. Wisc. 1984).

*Short*, 671 F.2d 178 (6th Cir.), *cert. denied*, 457 U.S. 1119 (1982). Thus, a defendant may not prior to trial challenge an indictment on the ground that the charge is not supported by adequate evidence. *Costello*, 350 U.S. at 363-64.

Defendant may offer at trial any evidence he has to rebut the allegations in the indictment. The court will not hold a "preliminary trial to determine the competency and adequacy of the evidence before the grand jury." *Id.* at 363; *United States v. Davis*, 714 F. Supp. 853, 869 (S.D. Ohio 1988). Accordingly, defendant's motion to dismiss Count 10 of the indictment or reduce it to a misdemeanor is denied.

### III. Motion for Severance of Offenses

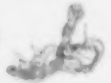
Defendant moves for severance of each count of the indictment, or alternatively for severance of the felony and misdemeanor counts. Defendant admits that the offenses were properly joined under Rule 8(a) of the Federal Rules of Criminal Procedure. Defendant nevertheless asks the court to exercise its discretion under Rule 14 governing relief from prejudicial joinder to order separate trials of each of the individual counts. *Fed. R. Crim. P.* 14.

Rules 8 and 14 "are designed to promote economy and efficiency and to avoid a multiplicity of trials where these objectives can be achieved without substantial prejudice to the right of defendants to a fair trial." *United States v. Fields*, 544 F. Supp. 265, 266 (E.D. Tenn. 1982) (citing *Bruton v. United States*, 391 U.S. 123, 131 (1968)). Thus, the mere contention that a single trial may have some adverse effect on defendant is insufficient to warrant severance; defendant must show that *substantial* prejudice would result. *Fields*, 544 F. Supp. at 266-67.

Defendant contends that a single trial of all counts in the indictment would be prejudicial because the jury may view the evidence presented in support of the individual counts cumulatively. However, such a general allegation is insufficient to meet defendant's burden of showing the likelihood of substantial prejudice. See *United States v. McCoy*, 848 F.2d 743, 744-45 (6th Cir. 1988). Nor has defendant made a sufficient showing that the jury is likely to confuse the evidence presented in conjunction with the individual counts. See *United States v. Rox*, 692 F.2d 453, 455 (6th Cir. 1982). The court can properly instruct the jury to consider the evidence for each count separately, and the court has been given no reason to believe the jury will not abide by those instructions.

Since defendant has failed to meet his burden under Rule 14 in showing that substantial prejudice would result from a single trial of all counts in the indictment, defendant's motion is denied.

### IV. Motion to Dismiss for Outrageous Government Conduct



The defendant asks the court to dismiss the indictment because of outrageous government conduct which defendant contends has violated his rights under the Fourth, Fifth, and Sixth Amendments. To obtain a hearing on a charge of prosecutorial misconduct, a defendant must "raise a material fact which, if resolved in accordance with the defendant[s] contentions, would entitle [him] to relief." *United States v. Holloway*, 778 F.2d 653, 658 (11th Cir. 1985), *cert. denied*, 476 U.S. 1158 (1986). "Evidentiary hearings need only be held when the moving papers allege facts with sufficient definiteness, clarity, and specificity to enable the trial court to conclude that relief must be

granted if the facts alleged are proved." *United States v. Irwin*, 612 F.2d 1182, 1187 n.14 (9th Cir. 1980).

A court may dismiss an indictment for outrageous government conduct based on its supervisory powers or because the conduct of the government deprived defendant of his Fifth Amendment rights to due process and to a grand jury. *United States v. Kilpatrick*, 821 F.2d 1456, 1465 (10th Cir. 1987), *aff'd sub nom. Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988). "[T]his Circuit has held that a court may not order dismissal of an indictment under its supervisory power unless the defendant has demonstrated that prosecutorial misconduct is a longstanding or common abuse in the district and that he has been prejudiced by the abusive actions." *Id.* (citing *United States v. Griffith*, 756 F.2d 1244, 1249 (6th Cir.), *cert. denied*, 474 U.S. 837 (1985)). Moreover, defendant must always demonstrate actual prejudice as a result of the alleged government conduct. *United States v. Talbot*, 825 F.2d 991, 998 (6th Cir. 1987), *cert. denied*, 484 U.S. 1042 (1988). Thus, defendant must show that "the violation substantially influenced the grand jury's decision to indict or [that] there is 'grave doubt' that the decision to indict was free from the substantial influence of such violations." *Bank of Nova Scotia v. United States*, 487 U.S. 250, 256 (1988) (quoting *United States v. Mechanik*, 475 U.S. 66, 78 (1986) (O'Connor, J., concurring)).

Defendant raises several allegations to support his claim of outrageous government conduct and has filed several affidavits in support of his motion. Some of the government conduct alleged by defendant in his motion allegedly occurred after the grand jury issued the indictment. Defendant has not and could not

possibly show that conduct which occurred after the issuance of the indictment prejudiced the grand jury process. See *Bank of Nova Scotia*, 487 U.S. at 258 (noting that particular allegation is "unrelated to the grand jury's independence and decision making process because [it] occurred *after* the indictment") (emphasis in original). Accordingly, in reaching a determination on defendant's motion, the court has not considered evidence of alleged government conduct which was separate from and had no effect on the grand jury process.<sup>5</sup>

In support of his claim of outrageous government conduct, defendant first contends that the government violated his Sixth Amendment right to counsel by "neutralizing" two attorneys who otherwise would have represented defendant. These attorneys testified before the grand jury on the charges at issue here, and the government still considers these attorneys potential witnesses in this case. Defendant has failed to show that the government violated his right to counsel by calling these witnesses to testify.

Furthermore, "mere government intrusion into the attorney-client relationship, although not condoned by the court, is not of itself violative of the Sixth Amendment right to counsel." *Irwin*, 612 F.2d at 1186-87 (footnotes omitted). Moreover, the dismissal of an indictment for an alleged Sixth Amendment violation is inappropriate absent demonstrable preju-

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<sup>5</sup> Such evidence includes allegations that after defendant was indicted, government agents implied that charges against a juvenile court officer would be dropped if he would assist in the prosecution of defendant and allegations that the government has failed to encourage witnesses to cooperate with the defense team.

dice or an adverse impact on the criminal proceedings. *United States v. Morrison*, 449 U.S. 361, 363 (1981). Accordingly, even if defendant could demonstrate that the attorneys were subpoenaed for an improper purpose, he has failed to demonstrate that the violation prejudiced the quality or effectiveness of his representation. *Id.*

Defendant next contends that the government's conduct in calling him to testify before the grand jury despite his avowed intention to assert his Fifth Amendment privilege against self-incrimination was outrageous and supports his motion to dismiss the indictment. The transcript of defendant's grand jury testimony shows that the prosecutor asked defendant with regard to each count of the indictment whether he knew the alleged victim and whether he had had sexual relations with the alleged victim. The prosecutor also asked defendant whether he wanted to make any statement with regard to the facts or the conduct of the investigation and then allowed the grand jurors to ask several questions. Defendant asserted his Fifth Amendment privilege in response to each question. The transcript also shows that the prosecutor instructed the grand jury that no adverse inference should be drawn from defendant's assertion of his Fifth Amendment rights.

Calling witnesses to testify despite their avowed intention to evoke the Fifth Amendment is not per se prejudicial to the defendant. *Bank of Nova Scotia*, 487 U.S. at 258-59. The record shows that the government asked defendant two questions about each of the counts in the indictment. It is undisputed that the government instructed the jury at least once that it was to draw no adverse inference from defendant's assertion of the privilege against self-incrimination.

While the court does not condone repeated questioning of a grand jury witness once it is clear the witness intends to rely on his Fifth Amendment privilege, these allegations do not justify dismissal of the indictment. See *United States v. Overmyer*, 899 F.2d 457 (6th Cir.), *cert. denied*, 111 S. Ct. 344 (1990) (courts should exercise extreme caution in dismissing indictment for misconduct before grand jury especially where no indication that government conduct was deliberate or done in a manner calculated to inflame grand jury); see also *United States v. Shuck*, 895 F.2d 962 (4th Cir. 1990) (defendant not prejudiced by prosecutor's repeated questioning after defendant claimed Fifth Amendment privilege); *United States v. Law Firm of Zimmerman & Schwartz, P.C.*, 738 F. Supp. 407, 412 (D. Colo. 1990), *aff'd in part and rev'd in part on other grounds sub nom. United States v. Brown*, 943 F.2d 1246 (10th Cir. 1991); *United States v. Duff*, 529 F. Supp. 148 (N.D. Ill. 1981) (forcing defendant to invoke privilege 56 times is not so flagrantly abusive as to justify dismissal).

Defendant also contends that the government threatened, harassed, and intimidated witnesses. Specifically, defendant maintains that witnesses were threatened with federal imprisonment, perjury indictments, and fear of losing custody of their children, and that government agents attempted to "put words in the mouths of various victims" and attempted "to get the witnesses, under threat and coercion, to back up and verify government theories." Defendant also alleges that polygraph examinations were used as a tool of intimidation. In support of these allegations, defendant has filed several affidavits of witnesses who were questioned by government agents. Defendant also contends that other witnesses who refuse to

provide the defense with affidavits will testify in response to a subpoena to appear at a hearing on this motion.

The affidavits submitted by defendant do not support a claim of outrageous government conduct. Affiant Reed Riley, a private investigator for defendant, states that he "had the feeling at all times that they were trying to confuse me and were angry with me because I would not say something bad against Judge Lanier as they thought I should" and that he felt "very threatened and intimidated." Mr. Riley stated that he voluntarily agreed to take a polygraph test.

Affiant Tina Hendrix stated that she was frightened by an interview with government agents who "talked about perjury and my daughter and seemed to imply that I was lying because I would not say anything bad about David Lanier." Ms. Hendrix stated that the agents made statements that frightened and intimidated her, but that she voluntarily agreed to take a polygraph examination. Ms. Hendrix stated that her contact with government agents caused her embarrassment, humiliation, and trouble with her spouse.

Affiant Billy Finley stated that government agents "got very angry because I was speaking in support of Judge Lanier." Affiant Walter Hastings stated that he also voluntarily agreed to take a polygraph test.

The affidavits filed by the government agents in response to the motion to dismiss dispute the allegations that they behaved in an angry or intimidating fashion when interviewing witnesses in the case. Furthermore, the government contends that none of the affiants who allege threatening or coercive

behavior on the part of government agents actually testified before the grand jury.

The affidavits submitted in support of defendant's motion to dismiss do not support the claim of outrageous government conduct. The affiants maintain only that they were subjectively intimidated by the interviews with government agents. See *Bank of Nova Scotia*, 487 U.S. at 262 (the subjective fear of a witness cannot be ascribed to governmental misconduct). The affidavits contain only conclusory statements rather than the allegedly intimidating or coercive behavior or statements of government agents.<sup>6</sup> See *United States v. Holloway*, 778 F.2d 653, 657 (11th Cir. 1985) (refusing to dismiss indictment where affidavits contained conclusory statements rather than actual quotations of the statements made to the prospective witness). Moreover, since none of the affiants testified before the grand jury, defendant cannot demonstrate the prejudice necessary to warrant dismissal of the indictment. *Id.* (disregarding affidavits where witnesses did not testify before the

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<sup>6</sup> Affiant Billy Finley stated, for example, that

[the government agent] began making threatening and nasty statements to me and demand of me that I take a lie detector test, implying that I was lying about some of the things I was saying. I agreed without hesitation to take the lie detector test.

. . .  
I felt threatened by [the government agent], and I felt the atmosphere was very coercive and that I was going to suffer some harm if I did not cooperate with the government. I felt pressure from [the agent] to respond in the way he wanted me to respond rather than simply telling him the facts as I knew them to be.

grand jury and noting that "not a single prospective witness before the grand jury contended in his or her affidavit that the so called 'threats' by the government officials had caused him to testify falsely before that body").

None of the remaining allegations of government misconduct support defendant's motion to dismiss the indictment. Since defendant does not allege any facts with sufficient specificity to enable the court to conclude that dismissal of the indictment is warranted if the allegations are proved, defendant is not entitled to a hearing and defendant's motion to dismiss the indictment for outrageous government conduct is hereby denied.

IT IS SO ORDERED this 30th day of October, 1992.

/s/ JEROME TURNER

JEROME TURNER

UNITED STATES DISTRICT JUDGE

# APPENDIX D

## UNITED STATES DISTRICT COURT WESTERN DISTRICT OF TENNESSEE

Case Number CR 92-20172-TU

UNITED STATES OF AMERICA

v.

DAVID LANIER DEFENDANT

## JUDGMENT IN A CRIMINAL CASE (For Offenses Committed on or After November 1, 1987)

[Filed: Apr. 19, 1993]

The defendant, DAVID LANIER, was represented by Wayne Emmons.

The defendant has been found not guilty on count(s) 1, 3, 9, 10 and is discharged as to such count(s).

The defendant was found guilty on count(s) 2, 4, 5, 6, 7, 8 & 11 after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such count(s), involving the following offense(s):

<u>Title &amp; Section</u>	<u>Nature of Offense</u>
18: USC 242	Deprivation of rights under color/law

<u>Date Offense Concluded</u>	<u>Count Number(s)</u>
08/89	2
10/90	4, 5 & 7
09/90	6
05/91	8
09/18/91	11

As pronounced on 4/12/93, the defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of \$ 225.00, for count(s) 2, 4, 5, 8, 11, 6 & 7, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 19th day of April , 19 93 .

/s/ JEROME TURNER

JEROME TURNER

United States District Judge

[This document entered on docket sheet in compliance with Rule 55 and/or 32(b) FRCrP on APR 19, 1993.]

Defendant's SSAN: [Deleted]

Defendant's Date of Birth: 11/16/34

Defendant's address: 219 South Main; Dyersburg,  
TN 38024

Defendant: DAVID LANIER  
Case Number: CR 92-20172-TU

### IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of:

12 months as to Count 2;  
12 months as to Count 4;  
12 months as to Count 5;  
120 months as to Count 6;  
120 months as to Count 7;  
12 months as to Count 8;  
12 months as to Count 11;

All sentences of imprisonment are to be served consecutively.

The defendant is remanded to the custody of the United States Marshal.

### RETURN

I have executed this Judgment as follows:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

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Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_  
at \_\_\_\_\_, with a certified copy of  
this Judgment.

\_\_\_\_\_  
United States Marshal

By \_\_\_\_\_  
Deputy Marshal

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Judgment-Page 3 of 4

Defendant: DAVID LANIER  
Case Number: CR 92-20172-TU

**SUPERVISED RELEASE**

Upon release from imprisonment, the defendant shall be on supervised release for a term of 2 years.

While on supervised release, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

1. If ordered to the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.
2. If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remain unpaid at the commencement of the term of supervised release.
3. The defendant shall not own or possess a firearm or destructive device.

### STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

- 1) The defendant shall not leave the judicial district without the permission of the court or probation officer.
- 2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
- 3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
- 4) The defendant shall support his or her dependents and meet other family responsibilities.
- 5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
- 6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.
- 7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.
- 8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

- 9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
- 10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
- 11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.
- 12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.
- 13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

## Judgment-Page 4 of 4

Defendant: DAVID LANIER  
Case Number: CR 92-20172-TU

**FINE**

The defendant shall pay a fine of \$ 25,000.00 plus \$1,492.00 per month during the period of incarceration for so long as defendant is entitled to receive and receives a pension from the State of Tennessee.

This fine (plus any interest required) shall be paid immediately to the United States of America.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

**APPENDIX E**

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

---

No. 93-5608

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

*v.*

DAVID W. LANIER, DEFENDANT-APPELLANT

---

[Filed: Jan. 4, 1995]

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**ORDER**

Before: MERRITT, Chief Judge; KEITH, KENNEDY, MARTIN, JONES, MILBURN, NELSON, RYAN, BOGGS, NORRIS, SUHRHEINRICH, SILER, BATCHELDER, and DAUGHTREY, Circuit Judges.

A majority of the Judges of this Court in regular active service have voted for rehearing of this case en banc. Sixth Circuit Rule 14 provides as follows:

The effect of the granting of a hearing en banc shall be to vacate the previous opinion and judgment of this court, to stay the mandate and to restore the case on the docket sheet as a pending appeal.

Accordingly, it is ORDERED that the previous decision and judgment of this court is vacated, the

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mandate is stayed and this case is restored to the docket as a pending appeal.

The Clerk will direct the parties to file supplemental briefs and will schedule this case for oral argument as soon as possible.

**ORIGINAL**

**95-1717**

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Supreme Court, U.S.  
**FILED**

**MAY 23 1996**

CLERK

**IN THE SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1995**

---

**No.**

**UNITED STATES OF AMERICA, Petitioner,**

**v.**

**DAVID W. LANIER, Respondent.**

---

**ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

---

**RESPONSE TO PETITION FOR A WRIT OF CERTIORARI**

---

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WILLIS & KNIGHT  
215 Second Avenue, North  
Nashville, TN 37201  
(615) 259-9600

Attorneys for the Respondent

15 12/2

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

---

No.

UNITED STATES OF AMERICA, Petitioner,

v.

DAVID W. LANIER, Respondent.

---

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

---

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

---

The Defendant/Respondent was convicted of violating the due process rights of five women, while acting "under color of law" as a Tennessee trial level judge. The alleged due process violations consisted of several acts of sexual harassment and assault, ranging from unconsented-to touchings to oral rape. The government contended below, and continues to contend, that these acts -- all punishable as misdemeanors or felonies under Tennessee law -- were constitutional crimes under 18 U.S.C. § 242, because they were committed by a judge, and the jurors found, pursuant to the trial court's instructions, that the acts were "shocking to the conscience".

The Sixth Circuit Court of Appeals, *en banc*, reversed the convictions, holding that the Defendant's acts did not come within any category of due process violations previously defined

by this Court<sup>1</sup>, and that, therefore, applying § 242 to those acts: 1) amounted to an ad hoc judicial creation of a constitutional crime<sup>2</sup>; 2) deprived the Defendant of fair notice that his conduct constituted a constitutional crime, punishable under federal law<sup>3</sup>; 3) amounted to an invalid ex post facto application of a criminal statute<sup>4</sup>; and 4) rendered § 242 fatally vague, thus providing prosecutors with over-broad, potentially dangerous discretion in enforcing it.<sup>5</sup> The Court did not address the Defendant's contention that his conduct had not been committed "under color of law", in that he did not commit it under "the pretense" of exercising his judicial

---

<sup>1</sup> The Defendant/Respondent agrees that if extensions of the scope of a criminal statute are to be effected by court decisions, such extensions should be confined to clear, nationally-applicable rulings by the Supreme Court; or perhaps, by a clear consensus of circuit court decisions. He submits, however, that the extension effected in the present case not only lacked Supreme Court precedent, it lacked clear precedent of any kind. Indeed, the basic point of this Response is that the boundaries of the extension itself are unclear.

<sup>2</sup> United States v. Wiltberger, 18 U.S., 35, 43, 44 (1820) (Marshall, C.J., "It is the legislature, not the court, which is to define a crime, and ordain its punishment").

<sup>3</sup> Lenzetta v. New Jersey, 306 U.S. 451, 453 (1938) ("No one may be required at peril of his life, liberty or property to speculate as to the meaning of penal statutes.")

<sup>4</sup> Bouie v. Columbia, 378 U.S. 347, 353, 354 (1964) ("If the legislature is barred by the ex post facto clause from passing . . . a law [which criminalizes an act that was non-criminal when committed], it must follow that a . . . court is barred by the due process clause from achieving precisely the same result by judicial construction").

<sup>5</sup> Cox v. Louisiana, 379 U.S. 559, 579 (1965) (Broad, vague criminal statutes do not "provide for government by clearly defined law, but rather for government by the moment-to-moment opinions of a policeman on his beat").

authority. Screws v. United States, 325 U.S. 91, 111 (1945) ("It is clear that under 'color' of law means under 'pretense' of law").<sup>6</sup>

The government contends that the Defendant's conduct had been sufficiently defined as violative of due process, by previous court decisions holding that "physical integrity" is entitled to due process protection under certain circumstances, and by decisions characterizing certain due process violations as "shocking to the conscience". The government in effect contends that the case law's use of such generalized language to describe due process violations in some factual contexts was sufficient notice that any physical assault committed by a state official, found by the jury to be shocking to the conscience, was ipso facto a constitutional crime under § 242. This is contended to be true, notwithstanding that most of the cited precedents were civil § 1983 cases, and none of them involved non-custodial assaults, as did the present case.

The basic defect in the government's position is the absence of any conceptual definition of the Defendant's alleged federal crimes. Even now, the government cannot describe, except in the broadest terms, the characteristics of the Defendant's conduct that supposedly rendered it violative of due process. The actions he was charged with committing were common assaults, with no apparent constitutional implications. They were alleged to have been committed by a man who was a judge, in his chambers during office hours, but they were personal, private

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<sup>6</sup> No contention was even made that the Defendant was purporting or pretending to exercise his judicial authority when he committed these assaults. Previous § 242 prosecutions have been confined to custodial assaults on arrestees or prisoners, for the obvious reason that only custodial officials can administer assaults under the color, or pretense, of exercising their official authority. The "color of law" argument was a clear ground for reversing the Defendant's conviction in this case, but, for whatever reasons, the Court of Appeals confined its analysis to the constitutional issue.

actions, which bore no resemblance to, and had no connection with, the performance of his judicial duties. For the same reason that they cannot be considered to have been committed "under color of law", they did not involve any element of state action which would render them constitutional violations. C.f., Delcambre v. Delcambre, 634 F. 2d 407 (5th Cir. 1981) (A police chief charged with assaulting his sister-in-law in the municipal police station, while on duty, did not violate § 1983 because the assault had no relationship to the performance of his official duties); Murphy v. Chicago Transit Authority, 638 F. Supp. 464 (N. D. Ill. 1986) (Staff attorneys who allegedly harassed and abused a fellow employee during office hours, in the work place, did not violate § 1983 because their actions "bore no similarity to the nature of the powers and duties assigned to the defendants."); Rogers v. Fuller, 410 F. Supp. 187 (M. D. NC 1976) (Police officers who stole \$35,000 dollars from the plaintiff's home while conducting a search did not violate § 1983, because they did not "misuse their authority by confiscating the coins without justification," but merely stole them).

Unless the constitution is to be treated as interchangeable with, and redundant of, state criminal laws, such purely private assaults cannot be -- and such assaults have never been -- given the status of due process violations. The application of § 242 urged by the government in this case would render it an occupational criminal statute, applicable to state officials who commit physical assaults, regardless of the factual circumstances in which the assaults are committed. The reasoning that underlies this prosecution would apply as well to the conduct of a judge who beat up a lawyer in a barroom brawl.

The government's attempt to give constitutional status to these assaults by labeling them "violations of physical integrity" which "shocked the conscience" of the jury merely underlines

the vagueness of the constitutional concept. Any assault, of course, violates the "physical integrity" of the victim, and most serious assaults are shocking to someone's conscience. As used in the case law, these phrases do not purport to comprehensively define unconstitutional conduct, they are merely characteristics of specific conduct that has for various reasons been held to be unconstitutional.

Criminal abortion statutes that unduly restrict the right to an abortion, and the use of force to extra-judicially punish a prisoner, for example, are intrusions upon "physical integrity", which amount to due process violations. Planned Parenthood v. Casey, 505 U.S. 833 (1992); Screws v. United States, 325 U.S. 91 (1945). But abortion laws and the use of force on prisoners are not due process violations merely because they "violate physical integrity", and are not invariably due process violations. Screws v. United States, 325 U.S. at 108, 109 ("The fact that a prisoner is assaulted, injured or even murdered by state officials does not necessarily mean that he is deprived of any right protected or secured by the Constitution or laws of the United States"). If all intrusions on "physical integrity" violated due process, all actions of state employees that have an unconsented-to effect on someone's body would be subject to prosecution under § 242. This is precisely what the government's argument suggests, but it is obviously not the case. Screws v. United States, *supra*, (The Defendant's murder of a prisoner violated due process only to the extent that it was intended to impose "trial by ordeal" in lieu of trial by legal process).

The use of the phrase "shocks the conscience" to "narrow" the definition of the offense is similarly misleading and unhelpful. This phrase was never intended as a comprehensive, free-standing definition of due process violations, and was never intended as a jury standard. It was

first used in Rochin v. California, 342 U.S. 165 (1951) to describe specific, reprehensible police actions held to have violated due process. These were official actions, analogous in their purpose and effect to coercing a confession or conducting an unreasonable search and seizure. They were given the status of constitutional violations because they had that purpose and effect, and because they were extreme enough to "shock the conscience" of the Court:

This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents -- this course of proceedings by agents of government to obtain evidence is bound to offend even hardened sensibilities. 342 U.S. at 172. (Emphasis added.)

There is no implication in Rochin, or in any other case, that a jury could find a constitutional violation by making a discretionary determination that a common assault "shocked the conscience". Such a jury standard is obviously too vague to serve as a basis for factually distinguishing constitutionally innocent from constitutionally guilty conduct. Compare, Rabeck v. New York, 391 U.S. 462 (1968) (A statute prohibiting the sale of magazines "which would appeal to the lust of persons under 18 years of age" held fatally vague); and Giaccio v. Pennsylvania, 384 U.S. 399 (1966) (A state statute providing that criminal juries "shall determine by their verdict whether . . . the defendant shall pay the costs" held fatally vague).

The present application of § 242 is also unprecedented in its potential scope. Previous applications have been confined to custodial assaults in which the defendants purported to be exercising their official authority to restrain or subdue arrestees or prisoners. The constitutional justification for such applications rests upon procedural, not substantive, due process grounds. Such excessive use of force on persons held in custody constitutes the infliction of corporal punishment -- trial and punishment "by ordeal" -- in lieu of, or in addition to, punishment by

constitutional process. Screws v. United States, 325 U.S. 91, 107 (1945). Even civil assault cases under § 1983 have been confined to custodial assaults by defendants purporting to perform official functions, with the rationale in isolated cases being extended to assaults by non-law enforcement officials, such as schoolteachers physically abusing students in their custody. Doe v. Taylor Independent School District, 15 F. 3d 443 (5th Cir. 1994).

The application of § 242 to this Defendant's conduct obliterates the definitional boundaries of these precedents. Apparently -- although by no means clearly -- it would make any physical assault by a state employee prosecutable under § 242, a conviction being subject only to a jury determination that the assault is shocking to the conscience. Such applications, would, among other things, violate the specific holding in Screws, that something more than physical violence by a state actor is necessary to constitute a violation of § 242, and would make all serious physical abuse and violence subject to federal jurisdiction when a state actor is involved.

Under analogous circumstances, this Court has declined to give such an open-ended definition to the due process clause, even in a civil context. In Paul v. Davis, 424 U.S. 693 (1976), the Plaintiff recovered a damages judgment under § 1983, because a notice posted by the police publicly identified her as a shoplifter, although she had never been prosecuted or convicted. The Court of Appeals affirmed, reasoning that freedom from defamation had, in other contexts, been defined as a due process "liberty interest" -- just as the government reasons in this case that the right to "bodily integrity" has been given due process status in other contexts. The Court further reasoned -- as the government is unable to do in this case -- that the deprivation of this liberty interest had been accomplished by declaring the Defendant guilty

of an offense for which she had never been prosecuted, in violation of her procedural due process rights.

This Court reversed the judgment for the plaintiff, holding that not every infliction of defamation by state action can be regarded as a violation of a constitutional liberty interest, simply because some actions having a defamatory effect have been so regarded. To accept the Court of Appeals' reasoning, the Court concluded, would make of § 1983 a "font of tort law to be superimposed upon whatever systems may already be administered by the states" 424 U.S. at 701. See, also, Baker v. McCollan, 443 U.S. 137 (1979) (Unreasonably detaining the defendant in jail for three days because of mistaken identity was not a violation of his due process "liberty interests" so as to justify a § 1983 claim); Parratt v. Taylor, 451 U.S. 527 (1981) (Loss or theft of a prisoner's property by prison personnel was not a "deprivation of property without due process of law", so as to justify a § 1983 claim).

Similarly, adopting the prosecution's theory in the present case would render § 242 a "font" of criminal law, to be superimposed upon state criminal codes when the Defendant is a public employee or official.<sup>7</sup> Such applications would not only do violence to the due process clause, they would violate acceptable boundaries of state-federal jurisdiction to an unprecedented extent. United States v. Bass, 404 U.S. 336, 349 (1971):

"[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. Congress has traditionally been reluctant to define as a federal crime conduct readily denounced by the state . . . [W]e will not

<sup>7</sup> Indeed, one of the dissenting judges expressly adopted the applicable state law classifications in determining whether the Defendant's alleged conduct was prosecutable under federal law, concluding that the convictions for conduct which would have constituted felonies under Tennessee law should be affirmed, but those involving Tennessee misdemeanors should be reversed. 73 F. 3d at 1397.

be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction."

### Conclusion

For the foregoing reasons, it is respectfully submitted that the application for a writ of certiorari in this case should be denied.

Respectfully submitted,

WILLIS & KNIGHT

By:

Alfred H. Knight, BPR #2968

215 Second Avenue, North  
Nashville, TN 37201  
(615) 259-9600

Attorneys for Defendant/Respondent

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been sent via United States Mail, postage prepaid, addressed to the following:

Drew S. Days, III  
Solicitor General

Deval L. Patrick  
Assistant Attorney General

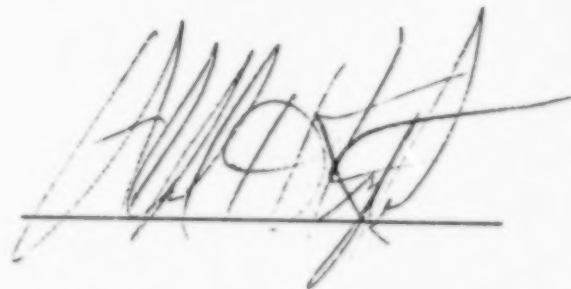
Paul Bender  
Deputy Solicitor General

Paul R.Q. Wolfson  
Assistant to the Solicitor General

Jessica Dunsay Silver  
Thomas E. Chandler  
Attorneys

Department of Justice  
Washington, DC 20530

On this the 22<sup>nd</sup> day of May, 1996.



c:\files\lanier\ape.ana

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May 22, 1996

Mr. William Suter  
U.S. Supreme Court Clerk  
U.S. Supreme Court  
1 First Street, NE  
Washington, DC 20543-0001

RE: United States of America v. David W.  
Lanier

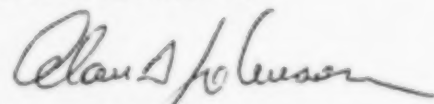
**95-1717**

Dear Mr. Suter:

Enclosed for filing are the originals and 10 copies of the respondent's motion to proceed in forma pauperis and response to the United States' petition for writ of certiorari. If there is anything further that you need, please feel free to call.

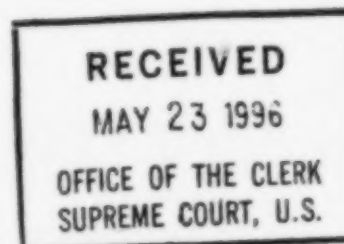
Sincerely,

WILLIS & KNIGHT

  
Alan D. Johnson

ADJ:jga

enclosures



4  
No. 95-1717

Supreme Court, U.S.

FILED

JUN 5 1996

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**In the Supreme Court of the United States**

OCTOBER TERM, 1995

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UNITED STATES OF AMERICA, PETITIONER

*v.*

DAVID W. LANIER

---

*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT*

---

**REPLY BRIEF FOR THE UNITED STATES**

---

DREW S. DAYS, III  
*Solicitor General*  
*Department of Justice*  
*Washington, D.C. 20530*  
*(202) 514-2217*

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# In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1717

UNITED STATES OF AMERICA, PETITIONER

*v.*

DAVID W. LANIER

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

## REPLY BRIEF FOR THE UNITED STATES

1. The court of appeals held that only a decision of this Court, in factually similar circumstances, can make clear the existence of a Fourteenth Amendment due process right for purposes of a prosecution under 18 U.S.C. 242. Pet. App. 28a-29a. We argue in our petition that the court of appeals' holding is contrary to decisions of other circuits, and presents a serious practical threat to federal prosecution of civil rights offenses involving abuses of official authority by brutal physical assaults or rapes. We also argue that the court of appeals' decision is not supported by the reasoning or language of *Screws v. United States*, 325 U.S. 91 (1945).

Respondent makes little effort to defend the holding of the court of appeals. Indeed, he suggests, contrary

to the court of appeals, that a due process right might be established based upon "a clear consensus of circuit court decisions." Br. in Opp. 2 n.1. That suggestion is at odds with the decision below, which stated that "*Screws* limits the reach of § 242 to cases in which the Supreme Court itself for the nation as a whole has made a particular constitutional right sufficiently clear that a violation of that right constitutes a crime as well as a civil wrong." Pet. App. 29a. Our petition describes (at 17-18, 23-24) how the court of appeals' narrow rule will seriously impair the government's ability to prosecute and punish serious assaults and rapes by state officials misusing their official authority.

2. Respondent argues that Section 242 has no application in this case because the rape and sexual assaults here were not constitutional violations, but merely "personal, private actions." Br. in Opp. 3-4. An assault by a state official does not violate Section 242 if the defendant does not act "under color of law," i.e., does not abuse official authority or the "pretense" of such authority. See *Screws*, 325 U.S. at 111; see also *United States v. Price*, 383 U.S. 787, 794-796 (1966).<sup>1</sup> But the jury correctly found in this case that respondent *had* acted under color of law when he sexually assaulted his victims. A panel of the court of appeals upheld that finding, expressly rejecting the argument that respondent had acted "merely for his

<sup>1</sup> Thus, respondent errs when he suggests that Section 242 "would apply as well to the conduct of a judge who beat up a lawyer in a barroom brawl." Br. in Opp. 4. Without proof that the judge had acted under color of law, that action could not be punished under Section 242.

own personal pursuits." Pet. App. 109a. The en banc court of appeals did not address that issue.

3. Respondent suggests that sexual assaults and rapes by state officials do not violate the Due Process Clause of the Fourteenth Amendment. See Br. in Opp. 4, 5. This argument may not be different from his "under color of law" contention, but to the extent that it is, it is also incorrect. A long series of decisions by this Court and lower federal courts has established that the Due Process Clause protects a fundamental right to bodily integrity, and has also established that this right includes the right to be free from unjustified physical assaults by state officials acting under the authority of their office. See Pet. 24-29 (discussing cases); see also Pet. App. 81a (Daughtrey, J., dissenting) (sexual assault is one of "the most blatant and serious invasions of the protected right to bodily integrity"). The argument that the fundamental right to bodily integrity does not include the right to be free from sexual assault has been squarely rejected. See, e.g., *Doe v. Taylor Indep. School Dist.*, 15 F.3d 443, 451-452, 455 (5th Cir.) (en banc), cert. denied, 115 S. Ct. 70 (1994); *Stoneking v. Bradford Area School Dist.*, 882 F.2d 720, 726-727 (3d Cir. 1989), cert. denied, 493 U.S. 1044 (1990).

Respondent suggests that it is inappropriate to rely on civil cases decided under 42 U.S.C. 1983 to determine whether a constitutional right has been made specific for purposes of a criminal prosecution under Section 242. Br. in Opp. 3. But the same constitutional rights are protected by Section 1983 and Section 242; indeed, Section 1983, like Section 242, is not a source of substantive constitutional rights, "but merely provides 'a method for vindicating federal rights elsewhere conferred.'" *Graham v. Connor*,

490 U.S. 386, 393-394 (1989). Congress intended the two statutes to cover the same conduct. See, e.g., *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 662 (1979) (White, J., concurring in the judgment). "There is thus nothing wrong with looking to a civil case brought under [Section] 1983 for guidance as to the nature of the constitutional right whose alleged violation has been made the basis of a section 242 charge." *United States v. Reese*, 2 F.3d 870, 884 (9th Cir. 1993), cert. denied, 114 S. Ct. 928 (1994); accord *United States v. Cobb*, 905 F.2d 784, 788 n.6 (4th Cir. 1990), cert. denied, 498 U.S. 1049 (1991); *United States v. Bigham*, 812 F.2d 943, 948 (5th Cir. 1987).

Respondent also suggests that any constitutional right to be free from assaults is limited to "custodial assaults," such as assaults on arrested persons and prisoners. Br. in Opp. 6. Many of the reported cases do involve custodial situations, reflecting the fact that state officials have greater opportunity to commit physical and sexual assaults under the authority of their office when victims are in their custody. The existence of the right to be free from official rape and assault is not confined to that context, however. The fundamental right to bodily integrity has been recognized in both criminal and civil cases involving assaults by state officials who have abused the power of their office in non-custodial settings. See *United States v. Tarpley*, 945 F.2d 806 (5th Cir. 1991) (Section 242 prosecution of physical assault by police officer of wife's former lover in his own home), cert. denied, 504 U.S. 917 (1992); see also *Dang Vang v. Vang Xiong X. Toyed*, 944 F.2d 476 (9th Cir. 1991) (rape by welfare official); *Shillingford v. Holmes*, 634 F.2d 263 (5th Cir. 1981) (assault on photographer by police officer);

*Gregory v. Thompson*, 500 F.2d 59, 62 (9th Cir. 1974) (assault by justice of the peace in his courtroom).

4. Respondent argues that proof of a violation of rights protected by the Due Process Clause cannot be dependent on an instruction to the jury that the defendant's conduct must "shock the conscience," and that use of that standard "underlines the vagueness of the constitutional concept." Br. in Opp. 4-5.

Respondent overlooks the point that Section 242 criminalizes only *willful* deprivations of constitutional rights. Under the standard of specific intent made applicable to Section 242 by *Screws*, a defendant "violates the statute not merely because he has a bad purpose but because he acts in defiance of announced rules of law. He who defies a decision interpreting the Constitution knows precisely what he is doing. If sane, he hardly may be heard to say that he knew not what he did." 325 U.S. at 104-105. "Once the section is given that construction, \* \* \* the claim that the section lacks an ascertainable standard of guilt must fail." *Id.* at 103. See also *Clark v. United States*, 193 F.2d 294, 296 (5th Cir. 1951); *United States v. O'Dell*, 462 F.2d 224, 232 n.10 (6th Cir. 1972). In accordance with *Screws*, the jury was instructed that it could not find respondent guilty unless he acted willfully in violation of the victims' rights.<sup>2</sup>

<sup>2</sup> The "shocks the conscience" instruction was read as an additional safeguard for respondent and in this case worked to respondent's benefit; the court used it, and elaborated upon it, to caution the jury that even physical abuse must be "serious and substantial" to constitute a violation of a constitutional right. See Pet. 8 (quoting C.A. App. 884-885). Similar language is used in other criminal law contexts to identify sanctionable conduct. For example, the basic Fourth Amendment inquiry in excessive force cases is one of objective reasonable-

5. Finally, respondent argues that the court of appeals' decision is consistent with the Court's unwillingness to permit an "open-ended" definition of due process rights, lest all torts by state officials become federal crimes. Br. in Opp. 7-8 (citing *Paul v. Davis*, 424 U.S. 693 (1976)). That concern has no relevance in the context of severe assaults upon the person by state officials acting under color of law—actions that have long been recognized to constitute invasions of a fundamental liberty interest protected by the Due Process Clause. See *Youngberg v. Romeo*, 457 U.S. 307, 315-316, 324 (1982); *Ingraham v. Wright*, 430 U.S. 651, 673 (1977). This is not a case where it is argued that the Due Process Clause itself "extend[s] \* \* \* a right to be free of injury wherever the State may be characterized as the tortfeasor." *Paul v. Davis*, 424 U.S. at 701.

Respondent contends that there is no reason for the Court to convert an ordinary matter of state criminal law into a matter for federal jurisdiction. Congress, however, enacted Section 242 because state remedies will not always be effectively available to those whose rights have been violated by state officials. Thus, in

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ness under the circumstances. See *Graham v. O'Connor*, 490 U.S. at 396-397. Juries in such cases prosecuted under Section 242 must distinguish "reasonable" from "unreasonable" force. See also *Hudson v. McMillian*, 503 U.S. 1, 8-10 (1992) (objective component of Eighth Amendment inquiry must look to "contemporary standards of decency," and use of force must not be "of a sort 'repugnant to the conscience of mankind'"); *United States v. United States Gypsum Co.*, 438 U.S. 422, 438-443 (1978) (antitrust laws may form basis of criminal violations despite "indeterminacy of the Sherman Act's standards"); *Miller v. California*, 413 U.S. 15, 30-33 (1973) (obscenity may be punished only if jury finds it violates "contemporary community standards" of decency).

the instant case, although respondent's rapes and sexual assaults certainly violated state law, respondent and his family "occupied positions of power and political authority in \* \* \* Dyer County, Tennessee, for several generations[,] [and thus] [i]t was clear that [respondent] was not going to be called into account for his misdeeds and judicial misconduct by local or county officeholders who had been beholden to the longstanding sway of the Lanier dynasty." Pet. App. 34a (Wellford, J., concurring in part and dissenting in part); see also Pet. 3. Application of Section 242 in cases like this one is fully consistent with Congress's objective of "provid[ing] a federal remedy where the state remedy, though adequate in theory, was not available in practice." *Monroe v. Pape*, 365 U.S. 167, 174 (1961).

\* \* \* \* \*

For the reasons stated above and in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Solicitor General

JUNE 1996

MOTION FILED

MAY 22 1996

No. 95-1717

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**In the Supreme Court of the United States**

OCTOBER TERM, 1995

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UNITED STATES OF AMERICA, *PETITIONER*

v.

DAVID W. LANIER, *RESPONDENT*

---

*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT*

---

**MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*  
AND BRIEF *AMICI CURIAE* OF THE SOUTHERN  
POVERTY LAW CENTER, THE NATIONAL  
ASSOCIATION OF HUMAN RIGHTS WORKERS AND  
THE CALIFORNIA WOMEN'S LAW CENTER IN  
SUPPORT OF THE PETITION FOR WRIT OF  
CERTIORARI**

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*  
AND BRIEF *AMICI CURIAE*

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The Southern Poverty Law Center, the National Association of Human Rights Workers, and The California Women's Law Center ("*amici*") hereby respectfully move for leave to file the attached brief *amici curiae* in this case. The consent of the Solicitor General, attorney for the petitioner, has been obtained. The consent of the attorney for respondent was requested but refused.

The interest of the *amici* in this case arises from the fact that they are civil rights organizations that consistently promote the proper application of federal civil rights law.

(I)

-II-

The brief *amici* propose to file supplements the arguments raised by the Solicitor General in his certiorari petition. Specifically, the brief lends additional support to the Solicitor General's certiorari request by providing an analysis of the breadth of the constitutionally protected right to bodily integrity, the focus of 18 U.S.C. 242 on remediating abuses of state power and the federal government's significant and continuing interest in redressing the increasing amount of violence perpetrated against women.

Moreover, the attached brief responds to the arguments likely to be raised by respondent in opposition to the Solicitor General's petition. For example, in his argument before the en banc Court of Appeals, respondent focused on the potential for state law punishment of his abusive acts. Respondent failed to recognize that federal civil rights law punishes state officials like himself who misuse their position to deprive others of their constitutional rights. Respondent also misconstrued this Court's precedent to determine that the constitutional right to bodily integrity excludes the right to be free of sexual assault, one of the most blatant and serious invasions of bodily integrity. Because it is likely that respondent will pursue the same reasoning before this Court, it is believed that the brief which *amici curiae* are requesting permission to file will provide the Court with a more complete argument concerning the constitutional protections under 18 U.S.C. 242.

-III-

In light of the foregoing, *amici* believe that the attached brief will assist the Court in its deliberations regarding the writ of certiorari sought in this case and, therefore, respectfully urge the Court to permit the brief to be filed.

Respectfully submitted,

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### INTEREST OF AMICI CURIAE

The Southern Poverty Law Center, the National Association of Human Rights Workers and The California Women's Law Center, with the consent of the Solicitor General, appear as *amici curiae* to provide the Court with an analysis of the application of federal criminal civil rights law. *Amici* are three civil rights organizations that provide educational, legal and social services to diverse communities.

Founded in 1971, the Southern Poverty Law Center ("The Center") is an internationally recognized leader in the area of civil rights litigation. The Center has litigated scores of pioneering civil rights cases on behalf of women, minorities, factory workers, poor people in need of health care, mentally ill persons, children in foster care, prisoners facing inappropriate conditions of confinement and many other victims of injustice. The Center has litigated and won five landmark civil rights lawsuits before this Court, including one of the first successful sex discrimination cases against the federal government, *Frontiero v. Richardson*.

The National Association of Human Rights Workers is one of the oldest civil rights organizations in the United States. The Association is composed of individuals who are engaged in human and civil rights work as professionals. Over the last several decades, this national network of human relations officials, educators, attorneys and community leaders has achieved international recognition for its pursuit of civil rights for all people.

The California Women's Law Center is a non-profit service organization established in 1989 to secure and advance the legal status of women in a wide range of areas, including employment, education, health care, child care, reproductive rights, family law and gender-based violence. The Women's

Law Center is widely known for its legal and social efforts to promote gender equality.

*Amici* have a substantial interest in demonstrating the applicability of federal legislation to criminal deprivations of civil rights by government officials who wrongfully use the power of their positions to sexually assault women.

## REASONS FOR GRANTING THE PETITION

### I. INTRODUCTION

Section 242, Title 18, of the United States Code prohibits the willful "deprivation of *any* rights, privileges, or immunities secured by the Constitution or laws of the United States" by persons acting under color of law. (Emphasis added). This statute provides for the federal prosecution of government officials who wantonly breach the public trust by unjustly using their authority to deprive others of their constitutional rights.

Respondent, former Tennessee Chancery Court Judge David W. Lanier, was convicted of seven criminal counts under this statute for sexually assaulting five women in his chambers during ordinary business hours -- once while wearing his judicial robe. Each of the victims was in respondent's chambers as a court system employee, as an applicant for such a post, or as a litigant over whom respondent had continuing jurisdiction. Respondent was the only Chancellor and juvenile court judge in Dyer and Lake Counties; all employees of the two courts therefore held their positions at his discretion. Moreover, at all relevant times, and as his victims well knew, respondent was a member of a local politically prominent family; indeed, his brother was the state prosecutor for the area.

The most egregious sexual violation committed by respondent was on a woman who was both a prospective court employee and former litigant before respondent's court in a child custody matter. Respondent perpetrated forcible oral rape on her when she visited his chambers seeking employment.

Before violating her, respondent told her that the custody matter could be reopened and reminded her that he would be the presiding judge on its rehearing. Respondent then lured her back to his chambers by claiming that he had another job prospect for her. Mindful of his power over her child custody matter as well as his formidable local political power, the victim reluctantly revisited respondent's chambers, where respondent committed forcible oral rape on her again.

Judge Lanier was convicted under 18 U.S.C. 242, sentenced to 25 years in federal prison and fined \$25,000. The Sixth Circuit Court of Appeals, in a unanimous opinion, affirmed the trial court's conviction and sentence, holding that the judge's sexual attacks constituted willful deprivations under color of law of the victims' constitutional "right to bodily integrity." On rehearing, a sharply divided en banc court reversed the original panel's decision and ordered all counts dismissed.

The Solicitor General then filed a petition for writ of certiorari with this Court, seeking review of the following issues: (1) whether "a defendant may [only] be convicted under 18 U.S.C. 242 for the willful violation of a right secured by the Due Process Clause of the Fourteenth Amendment [if] that right has previously been made specific by a decision of this Court in factually similar circumstances;" and (2) "[w]hether, for purposes of 18 U.S.C. 242, the right secured by the Due Process Clause of the Fourteenth Amendment to be free from interference with bodily integrity by a sexual assault by a state official acting under color of law has been 'made specific,' within the meaning of *Screws v. United States*, 325 U.S. 91 (1945)."

*Amici* urge that the petition for review be granted. Contrary to the Sixth Circuit's opinion, decisions of this Court as well as other federal courts have long "made specific" within the meaning of *Screws* both the right to bodily integrity guaranteed by the Constitution and the fact that this constitutional guarantee includes the right to be free from one of the most intrusive and repugnant forms of physical violation -- sexual assault. Accordingly, respondent was on notice at the time he sexually assaulted and orally raped women having business with his court that his actions were punishable under 18 U.S.C. 242. If the Sixth Circuit's order dismissing the charges against respondent were allowed to stand, the federal government's power to prohibit state officials from violating the constitutional rights of the women they are supposed to serve would be severely and unjustifiably limited.

## II. THE SIXTH CIRCUIT'S OPINION IMPROPERLY DENIES CONSTITUTIONAL PROTECTION FOR UNJUSTIFIED AND INVASIVE ASSAULTS ON BODILY INTEGRITY BY STATE OFFICIALS ACTING UNDER COLOR OF LAW

For over a century this Court has consistently recognized the overriding importance of a constitutional right to bodily integrity: "[N]o right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pacific Ry. v. Botsford*, 141 U.S. 250, 251 (1891). A long line of decisions by this Court has made clear that the "constitutional interest in

liberty . . . [includes] a right to bodily integrity, a right to control one's own person" and the right of a woman "to retain . . . ultimate control over her . . . body." *Planned Parenthood v. Casey*, 505 U.S. 833, 869, 915 (1992); *see also Rochin v. California*, 342 U.S. 165, 173, 174 (1952) (noting the "general requirement" that "states in their prosecutions respect certain decencies of civilized conduct" and avoid "force [that is] so brutal and so offensive to human dignity"); *Ingraham v. Wright*, 430 U.S. 651, 673 (1977) (stating that one of "the historic liberties" the Due Process Clause protects is "a right to be free from . . . unjustified intrusions on personal security"); *Youngberg v. Romeo*, 457 U.S. 307, 315-16, 324 (1982) (stating that "a right to freedom from bodily restraint" is not only "clear in the prior decisions of this Court," but has "always . . . been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action") (citation and quotations omitted); *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 278 (1990) (O'Connor, J., concurring) ("state incursions into the body [are] repugnant to the interests protected by the Due Process Clause").

Specifically, this Court has found the right to bodily integrity to be violated by the unwanted administration of medical procedures (*Cruzan*, 497 U.S. 261), the forcible administration of a "stomach pumping" solution to recover evidence swallowed by an arrestee (*Rochin*, 342 U.S. 165), the unreasonable use of bodily restraints on an institutionalized patient in a state mental hospital (*Youngberg*, 457 U.S. 307), the unreasonable administration of corporal punishment on public school students (*Ingraham*, 430 U.S. 651), the placement of certain restrictions on abortion (*Casey*, 505 U.S. 833) and a

court order requiring a female plaintiff in a civil tort action to submit to a surgical examination (*Botsford*, 141 U.S. 250).

Drawing on this precedent, other federal courts have likewise affirmed convictions under Section 242 for the commission of sexual assaults by government officials under color of law. Indeed, until this case, federal courts have consistently upheld convictions obtained under 18 U.S.C. 242 for sexual assaults perpetrated under color of law. *See United States v. Davila*, 704 F.2d 749 (5th Cir. 1983) (unanimously affirming convictions of Border Patrol Officers who used their office to coerce sex from, and sexually abuse, undocumented women); *United States v. Contreras*, 950 F.2d 232, 236 (5th Cir. 1991) (affirming conviction under Section 242 of police officer who sexually assaulted an undocumented woman whom he had detained following a traffic stop), *cert. denied*, 504 U.S. 941 (1992).<sup>1</sup>

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<sup>1</sup> In applying 42 U.S.C. 1983, "the civil counterpart" to Section 242, (*United States v. Price*, 383 U.S. 787, 795 n.7 (1966)), federal courts have also consistently held that sexual assaults committed by state actors under color of law violated the victims' constitutional right to bodily integrity. *See, e.g., Doe v. Taylor Independent Sch. Dist.*, 15 F.3d 443, 451 (5th Cir.) (en banc), *cert. denied*, \_\_\_ U.S. \_\_\_, 115 S. Ct. 70 (1994); *Dang Vang v. Vang Xiang X. Toyed*, 944 F.2d 476, 479 (9th Cir. 1991); *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 726-27 (3d Cir. 1989) (en banc), *cert. denied*, 493 U.S. 1044 (1990); *Hall v. Tawney*, 621 F.2d 607, 613 (4th Cir. 1980). Although decided under a different statute, these cases are nonetheless persuasive here because "[t]he protections of the Constitution do not change according to the procedural context in which they are enforced -- whether the allegation that constitutional rights have been transgressed is raised in a civil action or in a criminal prosecution, they are the same constitutional rights." *United States v. Reese*, 2 F.3d 870, 884 (9th Cir.

Department of Justice statistics further evidence the federal courts' longstanding recognition that sexual assault committed under color of law is a civil rights deprivation punishable under Section 242.<sup>2</sup> Since 1989, at least 17 judges, police officers, correctional officers and border patrol agents have been prosecuted and sentenced under Section 242 for improperly using their positions to rape and sexually assault women in their community. See Appendix at A-1 through A-5. Two other judges beside respondent have been sentenced for committing sexual assaults under color of law in violation of Section 242. *Id.* at A-1. They both pled guilty to the charges levelled against them, even though the assault perpetrated by one of them was less physically intrusive than the forcible rape committed by respondent. See Twila Decker, *Ex-Magistrate Admits Fondling*, THE STATE (Columbia, S.C.), Nov. 7, 1995, at B1 (former magistrate who, while he was still a judge, fondled the breast of a woman who had come to him for legal help, pled guilty to a one-count information charging a violation of 18 U.S.C. 242). Moreover, by the time respondent committed the assaults charged herein, two federal officers had already pled guilty to charges brought against them under Section 242 for sexually assaulting under color of law women they had detained. See Appendix at A-4.

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1993), *cert. denied*, \_\_\_ U.S. \_\_\_, 114 S. Ct. 928 (1994).

<sup>2</sup> Congress has likewise assumed sexual assaults committed by public officials under color of law are proscribed under 18 U.S.C. 242. In the Violent Crime Control and Law Enforcement Act of 1994, Congress enhanced the punishment for crimes of sexual violence prosecuted under Section 242. See Pub. L. No. 103-322, § 320103(b)(3), 108 Stat. 2109.

Accordingly, at the time respondent sexually assaulted women in his judicial chambers, the constitutional right to bodily integrity had been "made specific" within the meaning of *Screws v. United States*, 325 U.S. 91 (1945). It is not necessary for this Court to specifically determine, based on an identical factual situation, that a sexual assault by a state actor under color of law violates due process before respondent's blatant violations of women's civil rights may be punished. Sexual assault is one of the most intrusive methods of violating a person's bodily integrity. This Court has determined that less invasive actions by state officials -- such as the unreasonable use of bodily restraints and corporal punishment -- violate individuals' constitutional right to bodily integrity. It is axiomatic, then, that sexual assault by state officials acting under color of law also violates the victims' constitutional right to bodily integrity. Indeed, the lower courts have readily concluded, based on this Court's precedent, that sexual assaults deprive a person of his or her constitutional right to bodily integrity. Since 1989, seventeen other government officials have been sentenced for using their governmental power to sexually assault women in violation of Section 242 -- two of them in the same year that respondent committed the first assaults charged herein. See Appendix. Thus, respondent cannot claim that, at the time he committed these assaults, he did not know that his actions violated federal law. It was obvious under the prevailing case law that sexual assault committed under color of law offended a "principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental" and violated the Constitution. *Screws*, 325 U.S. at 95.

To require, as the Sixth Circuit did, a decision by this Court that is squarely on point before notice of a potential criminal civil rights violation will be deemed adequate would engender a multitude of wasteful appeals and impose a needless burden on courts, prosecutors and taxpayers. Under the Sixth Circuit's rule, no conviction could be final until this Court determined that the individual factual situation presented amounted to a constitutional violation. This would have the unconscionable effect of allowing obvious constitutional violations arising from slightly different factual situations to go unpunished until this Court has had the opportunity to specifically determine that the particular physical intrusion involved violates the Constitution. The state of the law would thus remain perpetually frozen in time, since this Court would be unlikely to encounter the identical set of facts twice.

The Sixth Circuit's en banc holding would have the further anomalous effect of affording greater constitutional protections to prisoners and criminal suspects than to law-abiding citizens. It would mean that a female arrestee would enjoy Fourth Amendment protection from an automatic strip search, but law-abiding women would not be protected from sexual assault by state actors under the Due Process Clause. See *Weber v. Dell*, 804 F.2d 796, 802 (2d Cir. 1986) (holding that, in the absence of a reasonable suspicion that a weapon or contraband is being concealed, the Fourth Amendment precludes strip searches of arrestees on minor charges), *cert. denied*, 483 U.S. 1020 (1987); *accord Chapman v. Nichols*, 989 F.2d 393, 395, 399 (10th Cir. 1993). While it is true that substantive liberty interests are not extinguished once an individual is remanded to the custody of the state (*Cf. Youngberg*, 457 U.S. at 315), it has never been held that

custody alone gives rise to greater liberty interests. Nonetheless, if the Sixth Circuit's decision is allowed to stand, law-abiding individuals will be entitled to fewer rights than arrestees or convicted felons in federal prisons.

Finally, it would be an anomaly to allow conduct as shocking as respondent's to escape punishment. The primary purpose of 18 U.S.C. 242 is to redress unconstitutional abuses of state power by public officials. Indeed, as this Court noted in *Screws*, 325 U.S. at 116, "it was abuse of basic civil and political rights, by states and their officials, that the amendment and the enforcing legislation [18 U.S.C. 242] were adopted to uproot." See also *Daniels v. Williams*, 474 U.S. 327, 331 (1986) ("The touchstone of due process is protection of the individual against arbitrary action of government . . . . [It] serves to prevent governmental power from being used for purposes of oppression.") (citations and quotations omitted). Unconstitutional abuses of state power may manifest themselves in a myriad of ways. See, e.g., *United States v. Stokes*, 506 F.2d 771, 775 (5th Cir. 1995) (holding that police officer violated arrestee's due process "right to be free from unlawful assault by state law enforcement officers" by severely beating him while he was in custody at the police station); *Shillingford v. Holmes*, 634 F.2d 263, 265 (5th Cir. 1981) (holding that a police officer violated the due process right of a tourist "to be free of state-occasioned damage to [his] bodily integrity" by striking him with a nightstick when he attempted to photograph the officer making an arrest). Recognizing this, Congress broadly worded both Section 242 and its companion conspiracy statute (18 U.S.C. 241) to ensure that the full range of governmental abuses giving rise to constitutional violations would be punished. *Cf. United States v. Price*, 383 U.S. 787,

801 (1966) ("[T]he events from which [Section 241] emerged illuminate the purpose and means of the statute in an unmistakable light. We [therefore] *must accord it a sweep as broad as its language.*") (emphasis added); accord *United States v. Johnson*, 390 U.S. 563, 566 (1968).

In the instant case, respondent used his leverage as a judge to extort, intimidate and sexually assault his victims. He threatened them with loss of their jobs and, in the case of one victim, custody of her child, if they did not submit to his demands. Moreover, these blatant and shocking displays of abuse of state power -- two forcible oral rapes and numerous sexual assaults -- were all committed in respondent's judicial chambers, the seat of his judicial power.<sup>3</sup> The idea that respondent's crimes had nothing to do with his state power is thus a preposterous one. Respondent was more than incidentally a state actor when he engaged in his criminal conduct. Respondent assaulted, in his judicial chambers, past and potential litigants before his court. He even committed one assault while wearing his judicial robe. This is exactly the type of gross abuse of state power that Section 242 was designed to protect against.

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<sup>3</sup> Rape itself "undermines the community's sense of security," as well as the individual victim's, thereby causing "public injury." *Coker v. Georgia*, 433 U.S. 584, 598 (1977). Respondent's added use of the power of his public office to sexually violate members of the community makes his crimes even more reprehensible, since such a flagrant misuse of state office serves to shake the public trust in the country's democratic and legal institutions.

### III. THE FEDERAL GOVERNMENT HAS A SIGNIFICANT INTEREST IN PROSECUTING VIOLENT, UNCONSTITUTIONAL ASSAULTS AGAINST WOMEN, PARTICULARLY WHERE, AS HERE, STATE REMEDIES MAY BE INADEQUATE

The federal government has a significant and longstanding interest in redressing violations of the Constitution. Indeed, acts like the ones perpetrated by respondent,

... which squarely and indisputably involve state action in direct violation of the mandate of the Fourteenth Amendment ... [are] a direct, traditional concern of the Federal Government. It is an area in which the federal interest has existed for at least a century, and in which federal participation has intensified as part of a renewed emphasis on civil rights.

*Price*, 383 U.S. at 806. Congress has shown a similar commitment to protecting the civil rights of women, as demonstrated most recently by its enactment of the Violence Against Women Act of 1994 (VAWA).<sup>4</sup>

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<sup>4</sup> The United States has also confirmed that it considers sexual assaults against women to constitute human rights violations where state actors participate in the assaults in some way. In 1995, the Immigration and Naturalization Service formally recognized rape, domestic abuse and other forms of violence against women perpetrated by or acquiesced in by government actors to be potential grounds for political asylum. See Ashley Dunn, *U.S. to Accept Asylum Pleas for Sex Abuse*, N.Y. TIMES, May 27,

Like other civil rights statutes before it (including Section 242), VAWA was enacted to stem a rising tide of violence against a distinct class of individuals,<sup>5</sup> ensure equal

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1995, at 1. These INS guidelines specifically provide that the evaluation of gender-based asylum claims must "be viewed within the framework provided by existing international human rights instruments and the interpretation of these instruments by international organizations." *Fisher v. INS*, 79 F.3d 955, 967 (9th Cir. 1996) (en banc) (Norris, J., dissenting) (quoting INS guidelines). The guidelines refer to a human rights convention that took place a decade before respondent assaulted his victims, the 1979 Convention on the Elimination of All Forms of Discrimination Against Women. The guidelines also mention the 1993 Declaration on the Elimination of Violence Against Women, adopted by the General Assembly of the United Nations, which officially recognizes violence against women "as both a per se violation of human rights and as an impediment to the enjoyment by women of other human rights." *Id.* (quotations and citation omitted).

It would indeed be "passing strange" (*United States v. Lanier*, 73 F.3d 1380, 1399 (6th Cir. 1996) (Nelson, J., dissenting)) if the United States were to condemn as human rights violations sexual assaults perpetrated against women by other countries' officials but yet, like the Sixth Circuit, fail to recognize that the same type of violence committed against women in this country similarly gives rise to a civil rights violation.

<sup>5</sup> Recent studies confirm that violence against women remains pervasive. According to the most recent statistics from the U.S. Department of Justice's Bureau of Statistics, in 1993 and 1994, women over the age of twelve annually sustained approximately 5 million violent victimizations (most often, sexual assaults and forcible rapes), 60 percent of which were perpetrated, as in the instant case, by offenders whom the victim knew. See *Prepared Statement of Janet Reno, Attorney General, Before the Senate Committee on the Judiciary Concerning the Violence Against Women Act*, 1996 WL 5512565 \*4 (May 15, 1996). The newly published report, UNDERSTANDING VIOLENCE AGAINST WOMEN ("VIOLENCE REPORT"), by

protection of the laws and rectify biases in existing state laws. See S. REP. NO. 138, 103d Cong. 1st Sess. 57-58, 68 (1993). Among other protections, VAWA provides an additional remedy -- over and above those already provided for in existing civil rights law -- to victims of gender-based violence. See 42 U.S.C. 13981; S. REP. NO. 138, 103d Cong. 1st Sess. 67 (1993) ("This legislation is in no way intended to undermine existing civil rights protections. . . . It should be read in harmony with, not in derogation of, those provisions.").

The federal government's interests in enforcing rights guaranteed under the Constitution and redressing violence against women are heightened in cases such as this, where potentially overlapping state remedies may be unavailable. Indeed, "one reason [Section 242] was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of [Fourteenth Amendment] rights, privileges and immunities . . . might be denied by the state agencies." *Monroe v. Pape*, 365 U.S. 167, 179 (1961); see also S. REP. NO. 138, 103d Cong. 1st Sess. 68 (1993) (noting in the legislative history of VAWA that "[u]nder the 14th Amendment, there is no clearer case of

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THE NATIONAL RESEARCH COUNCIL PANEL ON RESEARCH ON VIOLENCE AGAINST WOMEN, similarly reflects that approximately 75 percent of young women aged 12-18 suffer violent victimizations. VIOLENCE REPORT at 29. According to the report, women of all ages, races and geographic locations are most likely to suffer violence at the hands of a male assailant who is known to them (either an acquaintance, friend or intimate). *Id.* at 29-32. Twenty to 50 percent of all women will be victims of sexual assault in their lifetime (*id.* at 32); significantly fewer will suffer sexual violence at the hands of a state actor like the victims here, however.

Congress's power to legislate than when States have failed to protect equal rights."). Here, the stranglehold respondent and his family had on local state politics prevented him from being prosecuted by the state for his crimes. (His family was not only politically prominent in the county, but his brother was the local prosecutor.) Prosecution by the federal government therefore remained the only way to bring respondent to justice.<sup>6</sup>

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<sup>6</sup> In any event, even if his family's political power had not precluded respondent from being prosecuted under state law, the fact remains that this is the type of case federal civil rights law was intended to address. See *Monroe*, 365 U.S. at 183. ("The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.")

## CONCLUSION

For the foregoing reasons, *amici* urge that the petition for writ of certiorari be granted.

Respectfully submitted,

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May 1996

## APPENDIX

### ADDITIONAL CRIMINAL CIVIL RIGHTS PROSECUTIONS BROUGHT AGAINST GOVERNMENT OFFICIALS FOR SEXUAL ASSAULTS UNDER COLOR OF LAW 1989-1996

#### Assaults by Judges

*U.S. v. Lee* (11/6/95) (D. S.C.)

The former state magistrate in Horry County pled guilty to sexually assaulting a vulnerable woman who had come to him for legal advice.

*U.S. v. Morris* (1/19/95) (N.D. Miss.)

An Alcorn County justice pled guilty to sexually assaulting a woman during the course of a discussion with her regarding legal matters. He was sentenced to six months home detention, three years probation and fined \$3,000.

#### Assaults by Police Officers

*U.S. v. Contreras* (5/31/90) (S.D. Tex.)

A Laredo Police Department officer was sentenced to 61 years in prison and fined \$250,000 for his conviction of raping a Mexican woman while he was on duty and

(A-1)

## A-2

conspiring to murder her when she was to testify against him in connection with his state trial.

*U.S. v. Gregg* (5/30/90) (D. V.I.)

A Virgin Islands Department of Public Safety officer pled guilty to sexually assaulting an individual whom he had stopped for a traffic violation. He was sentenced to three months in prison and two years probation.

*U.S. v. Jackson & George* (7/14/92) (D. V.I.)

Two Virgin Islands Department of Public Safety officers were convicted of sexually assaulting a woman and stealing money from a man whom they had driven to a remote area. Jackson was sentenced to 70 months in prison; George was sentenced to six months imprisonment, fined \$5,000 and ordered to pay \$608 in restitution.

*U.S. v. Pich* (8/3/93) (N.D. Ill.)

A North Riverside police officer was sentenced to a year probation and agreed to resign from law enforcement after pleading guilty to providing a false statement to the FBI regarding his having consensual sex with a woman being detained by INS at the local jail.

*U.S. v. Sanchez* (3/29/94) (S.D. Tex.)

A Galveston police officer was sentenced to 15 years in prison and fined \$1,000 along with \$175 in special

assessments after being convicted of coercing five women into engaging in sexual acts with him and physically assaulting one of them. In January 1996, the Fifth Circuit Court of Appeals reversed his conviction and remanded for a new trial, ruling that the district court had abused its discretion in impaneling an anonymous jury. In April 1996, defendant Sanchez pled guilty to five misdemeanor charges for coercing women to engage in sexual acts with him while on duty as a Galveston police officer.

#### Assaults by Border Patrol and Correctional Officers

*U.S. v. Clendenen* (5/18/92) (W.D. Va.)

A Washington County correctional officer was sentenced to 37 months in prison and ordered to pay \$14,933 in restitution after pleading guilty to charges arising from his coercing inmates into sexual encounters in exchange for drugs and privileges.

*U.S. v. Foote* (8/28/90) (D. Ariz.)

The defendant, a detention officer of the Bureau of Indian Affairs, was charged in a 13-count indictment in the sexual assault of Indian women during their incarceration in a BIA jail in Peach Springs, Arizona. He was sentenced to two years in prison followed by two years of supervised release.

*U.S. v. Harrison* (11/16/94) (N.D. Fla.)

A Gulf County Sheriff was convicted of using his position as sheriff to coerce five female inmates at the Gulf County Jail to engage in sexual acts with him. He was sentenced to 51 months imprisonment to be followed by one year of supervised release.

*U.S. v. Huff* (1/9/92) (S.D. W.Va.)

A Wayne County probation officer pled guilty to having sex with a female probationer whom he threatened to send to jail if she did not comply. He was sentenced to 20 months imprisonment.

*U.S. v. Perales* (8/24/89) (S.D. Tex.)

An INS detention officer was sentenced to 10 months in prison for his guilty plea to a sexual assault of Mexican juveniles who were being detained.

*U.S. v. Ramirez* (10/11/89) (S.D. Tex.)

A Plant Protection and Quarantine Officer with the Animal and Plant Health Inspection Service of the Department of Agriculture was sentenced to two years probation and fined \$250 for his guilty plea to sexually assaulting female Mexican nationals crossing the border from Mexico into the United States.

A-5

*U.S. v. Selders* (4/5/95) (D. Ariz.)

A Border Patrol agent in Nogales pled guilty to sexually assaulting a female victim after detaining her for illegally entering the country. He was sentenced to 12 months in prison and three years probation.

*U.S. v. Smith* (4/20/95) (E.D. Ky.)

A correctional officer at the Federal Medical Center in Lexington was sentenced to 262 months in prison to be followed by three years supervised release after being convicted of sexually assaulting three female inmates and having sexual relations with a fourth female inmate.

*U.S. v. Toothman* (11/4/94) (S.D. Cal.)

An inspector with the Immigration and Naturalization Service was indicted for sexually assaulting a foreign national who was appealing the confiscation of her border crossing card. After the assault, the defendant returned the victim's border crossing card to her and offered to obtain border crossing cards for her children if she agreed to see him again.

*U.S. v. Walsh* (1/4/96) (W.D. N.Y.)

A correctional officer with the Orleans County Jail was indicted for stomping on the penis of an inmate. Another correctional officer witnessed the incident.

A-6

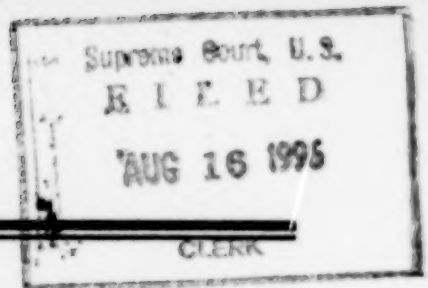
*U.S. v. Wescogame* (12/6/93) (D. Ariz.)

An officer with the Bureau of Indian Affairs pled guilty to raping a young Indian woman when she was being detained at a BIA detention facility. He was sentenced to 30 months in prison.

Source: *U.S. DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION, CRIMINAL SECTION.*

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No. 95-1717



**In the Supreme Court of the United States**

OCTOBER TERM, 1995

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UNITED STATES OF AMERICA, PETITIONER

v.

DAVID W. LANIER

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ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

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**JOINT APPENDIX**

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PETITION FOR A WRIT OF CERTIORARI FILED APRIL 22, 1996  
CERTIORARI GRANTED JUNE 17, 1996

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## NOTICE

The following items have been omitted in printing this appendix because they appear on the following pages in the printed appendix to the petition for a writ of certiorari:

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IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION

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Docket No. 92-20172

UNITED STATES OF AMERICA, PLAINTIFF

vs.

DAVID W. LANIER, DEFENDANT

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RELEVANT DOCKET ENTRIES

DATE	No.	PROCEEDINGS
5-20-92	1	INDICTMENT
8-24-92	21b	MOTION TO DISMISS BECAUSE THE STATUTE UNDER WHICH DEFENDANT IS INDICTED IS UNCONSTITUTIONALLY VOID FOR VAGUENESS AND BRIEF OF LAW IN SUPPORT
9-1-92	31	GOVERNMENT'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS THIS INDICTMENT CHJTU
10-1-92	45	<i>MINUTES: PENDING MOTIONS:</i> Moskowitz, Parker and Spain for govt., Emmons for deft. Court took under advisement motion to dismiss because statute of indictment is unconstitutionally void for vagueness and Motion to Dismiss indictment for outrageous governmental conduct. The Court denied motion to sever count 10 or reduce it to a misdemeanor and motion to suppress. The motion as to tapes was resolved.

DATE	No.	PROCEEDINGS
10-5-92	46	SUPPLEMENTAL RESPONSE TO DEFENDANT'S MOTION TO DISMISS INDICTMENT BECAUSE ITS VOID FOR VAGUENESS CHJTU
11-2-92	55	ORDER ON PENDING MOTIONS CHJTU, USA, USM, USP, PTS, OB, mailed Emmons
11-30-92	77	<i>MINUTES: JURY TRIAL BEGAN:</i> Parker and Spain for govt., Emmons and Naifeh for deft. Our of presence of jury. Timothy Naifeh introduced to assist Emmons. Judge Lanier to sit at table with counsel and be referred to as Judge [during] the course of the trial. Emmons not to refer to being former District Atty or Church of Christ Minister. Parker not to point to defendant angrily, but may, one time during closing arguments. Court DENIED Emmons' Third Motion for Continuance. Motion of Change of Venue DENIED. <sup>1</sup> Court DENIED Emmons' objections to late notice of expert notice. Prospective juror, Tommy Anderson, was sworn, asked about talking to other jurors that he knew defendant and they had married twin sisters. He was excused from this case. <i>Filed in open court:</i> Unsigned letter to Judge Turner. Motions for outrageous conduct and to prohibit prior sexual conduct of prospective witnesses will be heard at appropriate time. Court GRANTED Emmons' Motion to Individually voir dire jurors out of presence of other jurors because of the personal nature of some questions. 59 prospective jurors previously sworn were brought into the courtroom. <i>Jury selection</i> began. Voir dire by the Court. Individual voir dire of jurors out of presence of other jurors. Jury selection to resume tomorrow at 9:30 a.m.

DATE	No.	PROCEEDINGS
12-15-92	94	<i>MINUTES: JURY TRIAL RESUMED:</i> Parker, Spain and Moskowitz for govt., Emmons for deft. Emmons renewed his motion for judgment of acquittal. Arguments of counsel were presented. The Court granted the motion for judgment of acquittal as to count 9, but denied it as to the other counts. Discussion of jury charge. Jurors brought in and closing arguments were presented. Court adjourned to resume with jury deliberations Wed-12-16-92-9:30 a.m.
12-16-92	95	<i>MINUTES: JURY TRIAL RESUMED:</i> Parker, Spain and Moskowitz for govt., Emmons and Naifeh for deft. Juror #7 asked the Court to be excused for personal reasons. Ms. Terrell stated two reasons. The govt objected to excuse the jurors and the defense moved that the juror be excused. The Court DENIED the defense motion. Objections were brought before the Court on behalf of defense counsel and the govt responded. Jurors brought into the courtroom. The Charge was given. Alternate jurors excused. Recess. Note from the jury. Motion for Mistrial: Defense called (4) witnesses. Motion DENIED. Note from jury. Exhibits given to jurors except of exhibits marked ID only, two cassette tapes and video tape. Jurors brought into court and charge-page 24 was re-read. Jurors resumed deliberations.
12-18-92	99	VERDICT (counts 2, 4, 5, 6, 7, 8, & 11—GUILTY, counts 1, 3, & 10 NOT GUILTY)
12-18-92	100	VERDICT (count 6—ANSWERED YES)
12-18-92	101	VERDICT (count 7—ANSWERED YES)
12-24-92	104	MOTION OF DEFENDANT, DAVID W. LANIER, FOR A NEW TRIAL CHJTU

DATE	No.	PROCEEDINGS
12-28-92	105	AMENDED MOTION FOR NEW TRIAL CHJTU
12-18-92	*108	MINUTES: JURY TRIAL RESUMED: Parker, Moskowitz & Spain for govt., Emmons for deft. Answer to Jury's note re coercion. Jury returned with following verdict: Not guilty to counts 1, 3 & 10. Guilty to counts 2, 4, 5, 6, 7, 8 and 11. Special Interrogatories for counts 6 & 7 answered—YES. Special Interrogatory as to count 10 was not considered—due to not guilty verdict. Jurors polled individually. Dips SET for <i>Fri-3-26-93-9:30 a.m</i> (minutes received and stamp filed 12-29-92)
4-19-93	158	JUDGMENT IN A CRIMINAL CASE per minutes of 4-12-93. Copy to Case Manager for distribution. Original to file.

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION

Cr. No. \_\_\_\_\_  
18 U.S.C. § 242

UNITED STATES OF AMERICA, PLAINTIFF

vs.

DAVID W. LANIER, DEFENDANT

INDICTMENT

THE GRAND JURY CHARGES:

INTRODUCTION

1. David W. Lanier is the only chancellor for the Twenty-Ninth Judicial District for Dyer and Lake Counties in the State of Tennessee.

2. As the only chancellor for the Twenty-Ninth Judicial District, David W. Lanier handles all cases in Dyer and Lake Counties including divorce petitions, child custody proceedings, child support matters, appointment and removal of guardians, and adoptions.

3. David W. Lanier also acts as the only Juvenile Court judge in Dyer and Lake County. As such, David W. Lanier has jurisdiction over all Juvenile Court matters in those counties.

4. All Juvenile Court employees, including secretaries and juvenile officers, serve at the pleasure of David W.

Lanier. In addition, all clerical employees of the Chancery Court, including court secretaries and clerks, serve at the pleasure of David W. Lanier. These employees can be hired, promoted, disciplined, or fired at the will of David W. Lanier.

#### COUNT 1

On or about July 12, 1988, in the Western District of Tennessee

**DAVID W. LANIER**

while acting under color of law of the State of Tennessee, did wilfully subject Patricia Wallace, an inhabitant of the State of Tennessee, and an employee of the Circuit Court of Dyer County, to the deprivation of rights and privileges which are secured and protected by the Constitution, and the laws of the United States, namely, the right not to be deprived of liberty without due process of law, including the right to be free from wilfull sexual assault, that is, by wilfully touching Patricia Wallace on and near her crotch and otherwise molesting her, all in violation of Title 18, United States Code, Section 242.

[nmt 1 yr. or \$100,000.00, or both; and if bodily injury results, nmt 10 yrs. or \$250,000 or both, together with a mandatory special assessment of \$50. See 18 U.S.C. Section 3013(a)].

#### COUNT 2

In or about May through August, 1989, in the Western District of Tennessee,

**DAVID W. LANIER**

while acting under color of law of the State of Tennessee, did wilfully subject Sandra Sanders, an inhabitant of the State of Tennessee and an employee of the Dyer County Juvenile Court, to the deprivation of the rights and privileges which are secured and protected by the Constitution

and the laws of the United States, namely the right not to be deprived of liberty without due process of law, including the right to be free from wilfull sexual assault, that is by wilfully grabbing the breasts of Sandra Sanders and otherwise molesting her, all in violation of Title 18, United States Code, Section 242.

[nmt 1 yr. or \$100,000.00, or both; and if bodily injury results, nmt 10 yrs. or \$250,000.00 or both, together with a mandatory special assessment of \$50. See 18 U.S.C. Section 3013(a)].

#### COUNT 3

In or about May through August, 1989, in the Western District of Tennessee,

**DAVID W. LANIER**

while acting under color of law of the State of Tennessee, did wilfully subject Sandra Sanders, an inhabitant of the State of Tennessee and an employee of the Dyer County Juvenile Court, to the deprivation of the rights and privileges which are secured and protected by the Constitution and the laws of the United States, namely the right not to be deprived of liberty without due process of law, including the right to be free from wilfull sexual assault, that is by wilfully grabbing the buttocks of Sandra Sanders and otherwise molesting her, all in violation of Title 18, United States Code, Section 242.

[nmt 1 yr. or \$100,000.00, or both; and if bodily injury results, nmt 10 yrs. or \$250,000.00 or both, together with a mandatory special assessment of \$50. See U.S.C. Section 3013(a)].

#### COUNT 4

In or about September or October, 1990, in the Western District of Tennessee,

**DAVID W. LANIER**

while acting under color of law of the State of Tennessee, did wilfully subject Patty Mahoney, an inhabitant of the State of Tennessee and an employee of the Chancery Court of Dyer County, to the deprivation of the rights and privileges which are secured and protected by the Constitution and the laws of the United States, namely the right not to be deprived of liberty without due process of law, including the right to be free from wilfull sexual assault, that is by wilfully grabbing the breasts and buttocks of Patty Mahoney and otherwise molesting her, all in violation of Title 18, United States Code, Section 242.

[nmt 1 yr. or \$100,000.00, or both; and if bodily injury results, nmt 10 yrs. or \$250,000.00 or both, together with a mandatory special assessment of \$50. See 18 U.S.C. Section 3013(a)].

**COUNT 5**

In or about September or October, 1990, in the Western District of Tennessee,

**DAVID W. LANIER**

while acting under color of law of the State of Tennessee, did wilfully subject Patty Mahoney, an inhabitant of the State of Tennessee and an employee of the Chancery Court of Dyer County, to the deprivation of the rights and privileges which are secured and protected by the Constitution and the laws of the United States, namely the right not to be deprived of liberty without due process of law, including the right to be free from wilfull sexual assault, that is by wilfully touching his pelvis to the body of Patty Mahoney and otherwise molesting her, all in violation of Title 18, United States Code, Section 242.

[nmt 1 yr. or \$100,000.00, or both; and if bodily injury results, nmt 10 yrs. or \$250,000.00 or both,

together with a mandatory special assessment of \$50. See 18 U.S.C. Section 3013(a)].

**COUNT 6**

In or about September, 1990, in the Western District of Tennessee,

**DAVID W. LANIER**

while acting under color of law of the State of Tennessee, did wilfully subject Vivian Archie, an inhabitant of the State of Tennessee, to the deprivation of the rights and privileges which are secured and protected by the Constitution and the laws of the United States, namely the right not to be deprived of the liberty without due process of law, including the right to be free from wilfull sexual assault, that is by wilfully coercing Vivian Archie to engage in sexual acts with defendant Lanier, resulting in bodily injury to Vivian Archie, all in violation of Title 18, United States Code, Section 242.

[nmt 1 yr. or \$100,000.00, or both; and if bodily injury results, nmt 10 yrs. or \$250,000.00 or both, together with a mandatory special assessment of \$50. See 18 U.S.C. Section 3013(a)].

**COUNT 7**

In or about October, 1990, in the Western District of Tennessee,

**DAVID W. LANIER**

while acting under color of law of the State of Tennessee, did wilfully subject Vivian Archie, an inhabitant of the State of Tennessee, to the deprivation of the rights and privileges which are secured and protected by the Constitution and the laws of the United States, namely the right not to be deprived of liberty without due process of law, including the right to be free from wilful sexual assault, that is by wilfully coercing Vivian Archie to en-

gage in sexual acts with defendant Lanier, resulting in bodily injury to Vivian Archie, all in violation of Title 18, United States Code, Section 242.

[nmt 1 yr. or \$100,000.00, or both; and if bodily injury results, nmt 10 yrs. or \$250,000.00 or both, together with a mandatory special assessment of \$50. See 18 U.S.C. Section 3013(a)].

#### COUNT 8

In or about February through May, 1991, in the Western District of Tennessee,

#### DAVID W. LANIER

while acting under color of law of the State of Tennessee, did wilfully subject Sandy Attaway, an inhabitant of the State of Tennessee and an employee of the Chancery Court of Dyer County, to the deprivation of the rights and privileges which are secured and protected by the Constitution and the laws of the United States, namely the right not to be deprived of liberty without due process of law, including the right to be free from wilfull sexual assault, that is by wilfully touching his pelvis to the buttocks of Sandy Attaway and otherwise molesting her, all in violation of Title 18, United States Code, Section 242.

[nmt 1 yr. or \$100,000.00, or both; and if bodily injury results, nmt 10 yrs. or \$250,000.00 or both, together with a mandatory special assessment of \$50. See 18 U.S.C. Section 3013(a)].

#### COUNT 9

In or about February or March, 1991, in the Western District of Tennessee,

#### DAVID W. LANIER

while acting under color of law of the State of Tennessee, did wilfully subject Ruby Sipes, an inhabitant of the State of Tennessee, to the deprivation of the rights and privileges which are secured and protected by the Constitution and the laws of the United States, namely the right not to be deprived of liberty without due process of law, including the right to an unbiased tribunal and the right to be free from wilfull sexual assault, that is by wilfully exposing his genitals to Ruby Sipes and urging her to engage in sexual acts with him, all in violation of Title 18, United States Code, Section 242.

[nmt 1 yr. or \$100,000.00, or both; and if bodily injury results, nmt 10 yrs. or \$250,000.00 or both, together with a mandatory special assessment of \$50. See 18 U.S.C. Section 3013(a)].

#### COUNT 10

In or about April, 1991, in the Western District of Tennessee,

#### DAVID W. LANIER

while acting under color of law of the State of Tennessee, did wilfully subject Lisa Couch, an inhabitant of the State of Tennessee, to the deprivation of the rights and privileges which are secured and protected by the Constitution and the laws of the United States, namely the right not to be deprived of liberty without due process of law, including the right to be free from wilfull sexual assault, that is by wilfully coercing Lisa Couch to engage in sexual acts with him, resulting in bodily injury to Lisa Couch, all in violation of Title 18, United States Code, Section 242.

[nmt 1 yr. or \$100,000.00, or both; and if bodily injury results, nmt 10 yrs. or \$250,000.00 or both, together with a mandatory special assessment of \$50. See 18 U.S.C. Section 3013(a)].

## COUNT 11

On or about September 18, 1991, in the Western District of Tennessee,

DAVID W. LANIER

while acting under color of law of the State of Tennessee, did wilfully subject Fonda Bandy, an inhabitant of the State of Tennessee, to the deprivation of the rights and privileges which are secured and protected by the Constitution and the laws of the United States, namely the right not to be deprived of liberty without due process of law, including the right to be free from wilfull sexual assault, that is by wilfully grabbing the breasts and crotch of Fonda Bandy and otherwise molesting her, all in violation of Title 18, United States Code, Section 242.

[nmt 1 yr. or \$100,000.00, or both; and if bodily injury results, nmt 10 yrs. or \$250,000.00 or both, together with a mandatory special assessment of \$50. See 18 U.S.C. Section 3013(a)].

A TRUE BILL:

\_\_\_\_\_  
Foreman

Date: \_\_\_\_\_

Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION

\_\_\_\_\_  
[Caption Omitted]

\_\_\_\_\_  
**TRIAL TRANSCRIPT**

(December 2, 1992)

\* \* \* \* \*

[Testimony of Sandra Sanders]

[118] [Ms. Spain:] Q. Where do you work in the county?

[Ms. Sanders]: A. I work for Dyer County Juvenile Court.

Q. How long have you worked there?

A. Going on four years.

Q. What is your position at the Juvenile Court?

A. I'm Youth Service Officer.

Q. And what do you do as Youth Service Officer?

A. As Youth Service Officer, we prepare children for court, we supervise children on probation. We make referrals to agencies for children that are on drugs, maybe, or having behavioral problems. It's just a lot of different things that we do.

Q. Who is your boss in that position?

A. Judge David W. Lanier.

Q. Do you see Judge Lanier in the courtroom?

A. Yes, I do.

Q. Did you interview with Judge Lanier for that position?

A. Yes, I did.

Q. How did you come to be interviewed for your job?

[119] A. I heard about the job from one of his previous employees.

Q. Did you apply for the job?

A. Yes, I did.

Q. Did you eventually interview for that job?

A. Yes, I did.

Q. Who did you interview with?

A. Judge Lanier.

Q. Did you consider yourself qualified for the Youth Services Offices position?

A. Yes, I do.

Q. Why is that?

A. I have two years in criminal justice which is ninety-six hours and the job required 84 to 86, as well as I remember.

Q. When you interviewed with Judge Lanier, did you ever say that it was his sole decision whether you got hired for that position?

A. Yes.

Q. Okay. Is he the Chancellor in Dyersburg?

A. That's correct.

Q. What type cases did you understand he was dealing with as Chancellor?

A. He hears divorce cases, child custody cases, child support cases. He hears workmen's compensation cases in [120] Chancery Court.

Q. Is he also the juvenile judge in Dyersburg?

A. That's correct.

Q. And, therefore, he deals with the juvenile matters that you are involved with?

A. Yes, he does.

Q. Was he the only chancellor in Dyersburg?

A. Yes, he is.

Q. And, therefore, is he also the Chancellor for Dyer County and the only Chancellor in Dyer County?

A. Yes, he is.

Q. If you could, Ms. Sanders, tell the jury about your interview for the Youth Services Officer.

A. Well, the interview was pretty well like a basic interview until we got to the point—well, I made the

statement to him that I was old-fashioned in my beliefs. And I had heard some rumors that Judge Lanier and one of his previous employees had something going at one time. So, I made the statement at my first interview that I was old-fashioned in my beliefs and more or less wanted to get the point—

Q. (Interjecting) Did you understand that whatever the rumors that you heard, did you understand that that was a consensual relationship?

A. Yes.

\* \* \* \* \*

[123] Q. How many other people were in that office?

A. Myself, at the time, Rob Hammond, and Beth Daring was the secretary.

Q. How much interaction did you have with Judge Lanier in your position?

A. I was told that I was to have weekly visits with him because I was supervisor. I was to have weekly visits with him to let him know how the office was doing. Also, we have court twice a month. I would have to go over the docket with him twice a month for court.

Q. When you would have these weekly meetings with him, would it be just you and Judge Lanier?

A. That's correct.

Q. Did you come prepared to talk to him about what was going on in your office?

A. That's correct.

Q. Did he have any complaints about the way you were doing your job, the way you were supervising the office at that point?

A. No, he did not.

Q. How would you characterize your working relationship with him when you first started your job?

A. The working relationship was good, we got along. If we [124] had a disagreement, we tried to talk about it and we got along fine.

Q. I believe you also said you met with him on the docket to discuss what was going to go on in Juvenile Court, is that right?

A. That's correct.

Q. Would that just be you and Judge Lanier as well?

A. No, when we went over the docket, we usually—I usually had the other officer with me because they had cases just like I had cases and they knew more about theirs than I did.

Q. Ms. Sanders, I want to ask you about an incident. You were in Judge Lanier's office in a meeting, one of your weekly meetings, I believe. And he reached over and grabbed your breast. Would you tell the jury what happened?

A. I was there on one of my weekly visits. I really don't remember the conversation we were having. As well as I remember, we were talking about cases because that's why I was there. At the time, I was sitting in a chair and I always made sure when I came in I sat in the chair closest to the door.

Q. Why was that?

A. Because of the things that I had been, that I had heard.

Q. Go ahead.

A. He came over, sat beside me in a chair, and I don't [125] remember the conversation, but he just reached over and grabbed my breast.

Q. What did you do?

A. I became very upset, I sort of went into shock, like. I really—I don't remember what I done.

Q. Did you try to move his hand?

A. Yes.

Q. Did he actually grab your breast or did he just touch it, slide by—

A. He grabbed my breast.

Q. Did he say anything to you when he did that?

A. He could tell I became very uneasy and upset, I feel like. And he was saying things like, "Don't be afraid, don't be scared."

Q. What did you do?

A. I got up as soon—as fast as I could, and I got out of there. I just left because, again, I was sort of in a state of shock to think that this had happened to me.

Q. Did you say anything to him about it?

A. No, I did not.

Q. Did you talk to him later about the incident?

A. That incident, later on I did. Not at that point.

Q. Did you go and talk with him about it sometime afterwards.

A. No, I did not.

[126] Q. Why not?

A. Because I was thinking that he would get the message by me getting up and walking out. I was thinking he would get the message and leave me alone.

Q. Ms. Sanders, was it part of your job as a Youth Services Officer to go over to the courtroom of Judge Lanier and Juvenile Court?

A. Yes, it was.

Q. Now I ask you, do you recall events that when you were leaving the courtroom, Judge Lanier grabbed your buttocks?

A. Yes, I do.

Q. Would you tell us about why you were in court on that day?

A. Okay, we were in court. Like I said, we have court every second and fourth Wednesday and we were in there on juvenile cases. And when court was over, a lot of times there would be people standing around, like the D.A., and some of the attorneys and we might, you know, just chat a little while after court. Well, as we were walking out of the courtroom, the judge was coming

in behind me and when I was walking through the doors, when I was getting ready to go out, he grabbed me on my buttocks.

Q. How did he grab you on your buttocks?

A. He grabbed me.

Q. Was it a brush?

[127] A. It was a grab.

Q. Did you see him before he did that?

A. Yes, I did.

Q. How did you react?

A. There, again, I was more or less in a state of shock and I just hurried out the door as quick as I could to get out.

Q. Did you see him—did you turn around to look at him after he grabbed your buttocks?

A. Well, I seen him out of the—yes, I seen him out of the corner of my eye. I looked back, yes. I knew it was him.

Q. Did you say anything to him on that occasion?

A. No, I did not.

Q. Why didn't you talk to him then?

A. Again, I thought that he would get the message and leave me alone. I really felt that he would.

Q. Did you ever confront him about these two incidents, the two assaults that are charged in this indictment?

A. At that point, I didn't say anything at that point.

Q. Did you confront him later?

A. Yes, I did.

Q. What caused you to confront him about this?

A. I was in his office, again on a weekly visit. I was sitting in the chair that I always sat in, closest to the door. There's three chairs that sit there and I was always chose the one closest to the door. I was sitting in the [128] chair. I don't remember what we were talking about, but I got up out of my chair, I was getting ready to leave when he came over to me. He pinned me into the chair, backed me up against the chair and I was pinned

in to where I could not get loose. I was trying to get away and he had me pinned in to the chair. And when I turned my head, I finally got loose, and I was turned and he kissed me right on the lips.

Q. What did you do?

A. Again, I was in a state of shock to think that someone like this would do this, someone that's a judge that I looked up to. I was still in a state of shock.

Q. Were you able to get away?

A. Yes, I was.

Q. How did you get away?

A. Well, I got loose and—like I said, the door was right here and I got to the door and I got out.

Q. Did Judge Lanier say anything to you when he grabbed you and kissed you?

A. I don't remember anything he said, I can't remember anything.

Q. What were you doing when he was trying to grab you and kiss you?

A. Well, I was trying to get away.

Q. When you finally got away, where did you go?

A. When I got away, I went back to my office, which is not [129] in the courthouse. And, by the time I got back to the office, I was so angry, I was so upset—

Q. Excuse me, were you crying in Judge Lanier's office?

A. No, he never seen me cry at that point. He did not see me cry. As well as I remember, he did not see me cry then. I got back to the office. I sat in my office and I thought to myself, I said there is no reason why I have to put up with this. I do my job and I do it good and I care about these kids and I don't have to put up with it. At that point, I called him on the phone, I said, "I need to talk to you." And he told me to come on over.

Q. Why didn't you talk to him on the phone?

A. Because I wanted to get my message across to him. I wanted to make eye contact with him, I wanted him to know that I meant what I said.

Q. Were you concerned about going back to his office after what happened?

A. No, because I was really mad. I was mad. I was upset.

Q. What happened when you went back to Judge Lanier's office?

A. When I went back to his office, I sat down, again, in the same seat. I told him that I appreciated him as a person and a judge and I hope he appreciated me as a person, that I was happily married. I was going to church, I was trying to live right, to do right, and I did not appreciate what he [130] was doing to me.

Q. How did he respond?

A. He looked at me and he said, "I'm sorry. I'm sorry."

Q. What did you do?

A. I accepted his apology at the time, or I tried to. But it was hard to. I mean, I heard what he said and I wanted to accept it but it was hard.

Q. How was it hard?

A. It—

MR. EMMONS: May I approach the side bar?

THE COURT: Let me see you up here, lawyers.

\* \* \* \* \*

[132] BY MS. SPAIN

Q. Ms. Sanders, after you had this conversation with Judge Lanier, did you continue to work as the Youth Services Officer?

A. Yes, I did.

Q. Did you continue to have weekly meetings with Judge Lanier?

A. Yes, I did.

Q. Did Judge Lanier have any complaints about the way you performed your job?

A. Yes, he did.

Q. What happened?

[133] A. From that point on, I never done anything right. Knit-picky little things that he had never said anything to me about before that I had been doing wrong that I was doing wrong now. Later on, he then took my supervision of the offices away. I was no longer supervisor of the offices. I was to turn in doctors statements for days that I had missed and he singled me out of the whole office. I was the only one that had to do that.

Q. Did he explain to you why he took your supervision away and your position as supervisor?

A. Because I wasn't acting as supervisor?

Q. Were you aware—

THE COURT: I'm sorry, I didn't hear that answer. Because why?

A. Because I was not acting as—he was implying that I was not supervisor, that he took that away because I was not acting as I was supervisor, that I was not taking control at the time. Also, he told me that I myself and Edward Barr were on the same level.

Q. Who was Edward Barr?

A. The new employee that he hired after Lisa Golden left.

Q. Did he explain to you any specific procedures that you didn't follow?

A. I didn't come for my weekly visits like I was supposed to.

[134] Q. Ms. Sanders, why did you not go for your weekly visits?

A. Because I didn't want to be put back in that situation again. It was hard for me to go back over to his

office, knowing that I was going to have to go back there with him by myself.

Q. Were you afraid to go over to his office by yourself?

A. Yes.

Q. What were you afraid of?

A. I was afraid that something like that might happen again.

Q. Did you think about quitting your job?

A. No.

Q. Why not?

A. Because I knew I was doing my job and I was doing it well and I knew that I was getting through to these kids. And that's what I had always wanted to do was work with kids and I wasn't going to let that stop me because I knew they needed me.

Q. Are you still working in that position today?

A. Yes, I am.

Q. Did Judge Lanier continue to have complaints about the way you performed in your job?

A. Yes, he did.

\* \* \* \* \*

[141] Q. Did you ever go to the District Attorney's office in Dyersburg and complain about what he did?

A. No, I did not.

Q. Why didn't you do that?

A. Well, I guess I didn't because I'm just a small-town girl and I didn't think anybody would probably believe me over a judge. I didn't think anybody would believe me over him because he had so much influence in Dyersburg and I figured they would probably believe him instead of me.

Q. Did the FBI come and talk to you in this case? You didn't go to the FBI, did you?

A. No, I did not.

Q. Did they come and find you?

A. Yes, they did.

Q. Were you subpoenaed to testify in this case?

A. Yes, I was.

Q. Has this been hard for you?

A. Very hard, very hard.

\* \* \* \* \*

[147] [Mr. Emmons:] Q. Well, I make complaints about the way my secretaries and my employees do their job, too, all the time. I hear the same thing you're saying. But I can fire them any day, but I don't. He didn't use his judicial power or his power as your [148] boss in any way at all to retaliate against you, did he?

A. Well, I think he did. I think—

Q. Did he fire you? Are you saying because he complained about your work, that's retaliation?

MS. SPAIN: Your Honor—

A. He took my supervision away that he gave me—

MR. EMMONS: Just a moment, Ms. Spain is making an objection.

MS. SPAIN: Your Honor, I believe Mr. Emmons is cutting the witness off as she is fixing to explain how she felt the Judge Lanier used his powers, and I would ask that she be allowed to finish.

THE COURT: Let her fully answer the question. Go ahead.

BY MR. EMMONS:

Q. I'll rephrase the question and let you answer. I think you were about to answer that he took your supervisory powers away.

A. Yes, he did. He also singled me out. I was the only one to turn in doctor's statements for days that I missed, nobody else in the office, always complaining. Would you call that retaliation?

Q. You didn't get fired, though.

A. No, I did not.

\* \* \* \* \*

[158] Q. This is the way he retaliates at you, by letting you use [159] the county car?

THE COURT: Mr. Emmons, do you have a question?

BY THE WITNESS

A. Two years, a year or two?

THE COURT: Excuse me a second. You have a question, Mr. Emmons?

MR. EMMONS: I'll rephrase it, Your Honor. I'm sorry.

BY MR. EMMONS:

Q. In other words, this was after you felt like he was being retaliatory towards you?

A. As well as I remember, I can't remember if it was that I used that car before I confronted him or after I confronted him. I cannot remember.

Q. You just said about a year ago, it was three years ago—

A. I said a year or two.

Q. I'm sorry, I misunderstood you.

A. I can't remember the exact date.

Q. Did you have a county car during your entire tenure or the very beginning of your tenure as a juvenile court officer?

A. Yes, I did—I do.

Q. The matters you talked about and testified on direct in regard to the allegation you made about him touching you all took place very early on at the first month or two while you [160] were there?

A. That's correct.

Q. So when you went to the doctor in Jackson in the county car, it would have been after this, wouldn't it?

A. I really can't recall.

Q. You can't recall?

A. I can't remember the exact date.

Q. Do you think it was the first month or two you worked there?

A. If I say yes or no, I can't answer you right because I don't remember.

Q. But, in other words, he said okay, technical violation of the rules but he said, emergency, go ahead?

THE COURT: Mr. Emmons, we're getting repetitive. Let's go on to a new question.

MR. EMMONS: I need to follow up on this one.

THE COURT: Well, you can follow up but don't ask it again.

MR. EMMONS: Yes, sir.

BY MR. EMMONS:

Q. Ms. Sanders, were there not other incidences where you used the county car for your personal use?

A. On one other occasion, maybe.

Q. And what was that for?

A. I didn't have my car and I might have used the car one [other time].

\* \* \* \* \*

[181] REDIRECT EXAMINATION

BY MS. SPAIN:

Q. Ms. Sanders, before Judge Lanier assaulted you and you confronted him, did he ever complain about the way you supervised the Youth Services Office?

A. No, he never really made any complaints.

Q. Before he assaulted you, did he ever complain about the way you dealt with juveniles in your job?

A. No, he did not.

Q. Did he ever require you to have a sick leave list, if you were actually sick and had to take a day off?

A. No, he did not.

Q. Would you say that Judge Lanier's attitude changed after you confronted him about the assault on you?

A. Yes, it did.

Q. Did he constantly complain about the way you supervised the office?

A. Yes, he did.

Q. What did he tell you when you asked him about a raise?

A. When I—I'm going to have to go back a little piece. When I was hired in with Rob, the Judge and I had talked about a raise and I didn't feel at the time that I needed to be—have a raise at that time because I was coming in and Rob had been there two and a half years, okay? So I went back to him later after I had been there, I went to him and [182] asked him for a raise. When I asked him about a raise, he told me that I didn't deserve a raise, that I was making good money for a woman, that he had got letters from people complementing him on how well Lisa Golden was doing her job but I, he hadn't got anything on me, that, more or less, I was sitting over there drawing a paycheck and I wasn't doing anything.

Q. Did he continue to complain about the way you performed your job after he had assaulted you?

A. Yes, he did.

Q. After the FBI came to you, did his complaining continue or get worse?

A. Yes, he did. It continued.

Q. I believe that you told Mr. Emmons that the sick leave policy, or I believe Mr. Emmons asked you about the sick leave policy, when it was instituted. Did he institute that policy near the time this investigation began?

A. I really can't—I really don't know the answer to that. To that county policy? No, I can't remember.

Q. Were you missing days at work because you had been subpoenaed to testify in front of the grand jury in this case?

A. Yes, I was missing those days.

Q. Did Judge Lanier continue, during this investigation, to complain about the way you performed your job?

[183] Yes, he did. Constantly.

Q. Now Ms. Sanders, I believe that you told Mr. Emmons that this has been tough for you and he pointed out that Judge Lanier had not fired you. Had Judge Lanier retaliated against you for your conversation with him?

MR. EMMONS: Your Honor, I'm going to object to this. May I approach the side bar?

(Whereupon, counsel approached the bench, and the following occurred out of the hearing and presence of the jury, as follows:)

(Whereupon, counsel returned to the counsel table, and the following occurred in the hearing and presence of the jury, as follows:)

BY MS. SPAIN:

Q. Ms. Sanders, I'll ask you again. Do you believe that Judge Lanier retaliated against you after you talked to him about the assault on you?

A. Yes, I believe he has.

[184] Q. How?

MR. EMMONS: I'm going to object, Your Honor, to that question. I'm not interested in her opinion, I don't think that's right.

THE COURT: The objection is sustained. Ladies and gentlemen, disregard the last question and answer. Go ahead.

BY MS. SPAIN:

Q. Ms. Sanders, could you tell me what Judge Lanier did or what changes that he made after you talked with him about your job? What changes did he make in the way you were supposed to perform your job?

A. He constantly made complaints about how I done my job, that I didn't follow procedures. Constantly, he made statements at open court when I was having to go in court with juvenile cases, he made statements in open court. Just took my supervision away, required me out of the whole office to turn in doctor's statements, just one thing after the other.

Q. Did this continue until Judge Lanier stepped down?

A. Yes, it did.

\* \* \* \* \*

[212] SANDY MAE ATTAWAY,

The said witness, after having been first duly sworn, was examined and testified, as follows:

# DIRECT EXAMINATION

BY MS. SPAIN:

\* \* \* \* \*

[213] Q. Are you married?

A. Yes, I am.

Q. Do you have any children?

A. Yes, I do.

Q. How many children and how old are they?

A. I have one boy and he is seven.

Q. Ms. Attaway, do you know Judge David W. Lanier?

A. Yes, I do.

Q. How do you know him?

A. I was friends with his daughter, and then I worked for him.

Q. Which daughter were you friends with?

A. Leigh Anne.

Q. Did you go to school with her?

A. Yes, I did.

Q. You say you worked for Judge Lanier. How did you come to work for him?

A. Leigh Anne had told me that he had needed a secretary and so I told her that I would like to apply for the job.

Q. Did you apply for that job?

A. Yes, I did.

Q. Do you recall when that was?

A. When I applied for it, it was probably the latter part of February when I talked to Judge Lanier.

[214] Q. Was that 1991?

A. 1991, yes.

Q. Okay. Did you have an interview with Judge Lanier?

A. Yes, I did.

Q. Can you tell us about that interview?

A. It went as a basic interview would. He asked basic questions, why I thought that I wanted the job, and just a basic interview.

Q. Did you get the job?

A. Yes, I did.

Q. When did you start?

A. It was the first week in March, it was the 2nd or the 3rd of March.

Q. Is that March of 1991?

A. Yes, 1991.

Q. How long did you work for Judge Lanier?

A. Approximately three months.

Q. Ms. Attaway, after you started working for Judge Lanier, did he begin to make some sexual comments to you?

A. Yes, he did.

Q. How long did you work with him before he made those comments?

A. About a month. It didn't start right off the bat.

Q. During the first month that you worked there, how would you characterized your working relationship with Judge [Lanier?]

\* \* \* \* \*

[224] Q. Can you tell that jury what happened when you get him to sign the papers?

A. Uh, I had some attorneys in my office that needed some orders and stuff to be signed. So, the Judge had taken a break and I told him that I would come in there and get the Judge to sign them. I walked in there and told him that I had some orders to sign, that the attorneys were waiting in my office. I had the papers in my hand. He comes around behind me, drapes his arms around me and holds me, and then pushed his pelvic area into my rear end and began grinding into me. As soon as I felt that, I just jumped. And then I turned around and said, "You better stop it." And he said, "Shhh, they can hear you out there." And then I lowered my voice and I said, "Then you'd better leave me alone."

He grabbed the papers from my hand, signed them, and said, "Here." I walked out.

Q. Ms. Attaway, I know this is difficult. When he came up behind you, where did he grab you?

A. Where did he grab me?

Q. Yes.

A. He had his arms and he grabbed me around so that he had me basically like this (indicating).

Q. And you are indicating that he had his arms around you?

A. Around me, yes.

[225] Q. And you said he took his—

A. He took his pelvic area and was pressed up against me.

Q. Pressed up against your buttocks?

A. Against my buttocks, yes.

Q. Did you feel anything?

A. Yes.

Q. Ms. Attaway, could you feel his penis against you?

A. Yes, I could.

Q. Could you feel if it was erect?

A. Yes. It was—I would say I could feel it.

Q. Could you tell if that is what he was rubbing against your buttocks?

A. That is what he was rubbing against me, yes.

Q. How long do you think he did that before you yelled to leave you alone?

A. Just a few seconds. As soon as I felt it, it was just like all I could do was just jump. I just jumped.

Q. Then what did he do?

A. He grabbed the papers and signed them and then handed them back to me and I left.

Q. But before you left, you said you said something to him?

A. Yes. That is when I hollered and told him to leave me alone. I just jumped. It was a spur of the moment, and [226] I said, "You'd better leave me alone." And then he said, "Shhh, they can hear you."

Q. Who was he referring to?

A. The people in the courtroom. The courtroom was full, it was on a court day.

Q. Is that why he had just come out of court?

A. Right.

Q. Did he still have on his judicial robe?

A. Yes, he had on his robe.

Q. Did he say anything to you when you told him he better stop?

A. No, other than—well, now, the last time he didn't when I walked out. But now he did, he said, "Shhh, they can hear you." And then I turned and said, "Then, you'd better leave me alone." And he just jerked the papers from my hand and signed them and did them like that.

\* \* \* \* \*

[242] BY MS. SPAIN:

Q. Ms. Attaway, did Judge Lanier ever ask you if you were afraid of him?

A. Yes, he did.

Q. How many times did he ask you that?

A. Twice.

Q. How did you respond to that?

A. I told him no.

Q. Was that the truth?

A. No.

Q. Why did you tell him no?

A. I didn't want him to think that I was afraid of him. If I was afraid of him, I was a weak person and he could—

[243] Q. He could what?

A. I would say manipulate weak people. And I definitely did not want him to think that I was a weak person.

Q. Did Judge Lanier tell you why he asked you that, if you were afraid of him?

A. He told me that he was a judge and everybody should be afraid of him.

\* \* \* \* \*

[244] Q. Now, Ms. Attaway, when you first applied with Judge Lanier, were you afraid that you weren't going to get the job as his secretary?

A. Was I afraid that I wouldn't?

Q. Yes.

A. It had crossed my mind.

Q. Did you have a concern about something?

A. Yes. I had a case that had went before him and my attorney had told me that he was going to appeal it and get us a new trial.

Q. What type of case did you have?

A. It was an auto accident.

Q. You were involved in an automobile accident?

A. Yes.

Q. Did you have an attorney?

A. Yes, I did.

Q. Did you file a lawsuit in that case?

A. Yes.

Q. Did the other side also have an attorney?

A. Yes.

THE COURT: Let me interrupt you. I'm not sure I heard something, and I just want to make sure. Did you say you had a case in his court?

THE WITNESS: Yes, sir.

THE COURT: Okay, go ahead.

[245] BY MS. SPAIN:

Q. And did the other side also file a lawsuit?

A. Yes.

Q. How did your attorney explain that to you?

A. How did he explain?

Q. How did you explain that the lawsuit worked? You had filed a lawsuit, is that right?

A. Right.

Q. And the other side had also filed one?

A. Right.

Q. Did you have a trial?

A. Yes.

Q. Who was the trial in front of?

A. Judge Lanier.

Q. Did this occur before you ever applied with Judge Lanier?

A. Yes.

Q. And what happened at that trial?

A. It was a jury trial and the jury did not side for either one of us.

Q. So, would you say both sides lost?

A. Both sides lost, yes.

Q. And what happened after that?

A. My attorney told me that he was going to appeal it, that we should have won it.

[246] Q. Okay. And do you know if he did that?

A. He never talked to me about it. Later I found out that he did.

Q. Has your lawsuit been resolved even today?

A. No.

Q. Now, at the time that you applied to work for Judge Lanier as his secretary, what was your concern with your lawsuit?

A. Well, I knew that he could not hear my lawsuit if I was employed by him. So, I had thought that, you know, that might would keep me from getting the job.

Q. Did you later find out that there could be something done about that?

A. Yes. I was told that he could step down.

Q. Who would hear your lawsuit?

A. I don't know, but that, you know, he would not hear it.

Q. When you applied with Judge Lanier, did he ever bring your lawsuit up?

A. No.

Q. Okay. While you worked for him, did it ever come up?

A. He had brought my file into my desk one time and it had motion granted. And then I looked down and it was my file and we neved did—I mean, we didn't even talk about it then.

[247] Q. What type of motion was that, do you know?

A. I guess it was an appeal.

Q. Was that for a new trial?

A. Right.

Q. Have you had a new trial on that case yet?

A. No.

Q. After you were hired with Judge Lanier, I believe you said you worked there for how long?

A. Approximately three months.

Q. Why did you leave?

A. He called me to his office one day and told me that things just weren't working out between us and I needed to find another job, that I could stay until I found another job but I needed to find another job.

Q. Did he give you any reason for letting you go?

A. He just said things weren't working out.

Q. Did you ask him what that meant?

A. Yes, I did. I said, "What do you mean?" He said "I'm just saying things aren't working out between us." I then said, "It's because I won't have anything to do with you isn't it?" He said, "Huh, I haven't tried anything with you."

Q. I'm sorry, I didn't understand what you just said.

A. He said, "Huh, I have never tried anything with you." Then I looked at him and I said, "You sure haven't, [248] have you." I was being really sarcastic to him.

Q. Did he ever give you any other reason why he was letting you go as his secretary?

A. He said that I had wore jogging pants to work.

Q. Have you?

A. No. He said that I had messed his calendars up, which I had not.

\* \* \* \* \*

[257] A. He asked me what the telephone calls were being said. And I told him that they were very vulgar and I'd just as soon not tell him. And he said, "Come on, you can tell me." He said, "I want to know what they are saying to you."

Q. What did you say?

A. And I said, "Well, they are calling me by name telling me that they have a big ten inch 'blank,' and I used the word blank to him, 'and heard that I liked to suck and the 'f' word that rhymes with it."

Q. Is that the way you told it to him?

A. Yes.

Q. Is that the way the caller on the phone said it?

A. No.

Q. How did he respond when you told him that?

A. He said, "Do you?"

Q. What did you say?

A. I look at him and I said, "That is none of your business." I stood up and went for the door.

Q. What happened?

A. He grabbed me.

Q. Did he say anything?

A. Nope. He just grabbed me, turned me around and had me like this and went to kiss me. He was holding me at this time. I mean, his arms was around me and he was holding me. He went to kiss me, I turned my head. And then he [258] landed on my neck and kissed my neck several times. And then I just said, "I got to go." And I just pushed away from him and I grabbed the door.

Q. During your conversation about this phone call, after he asked you if you did do that, did he say anything else to you about your job?

A. About my job or about the job I—

Q. Do you recall if he told you what it would have taken for you to keep your job?

A. No. He told me that if I would have liked that, we would have—

MR. EMMONS: Your Honor, excuse me—

THE COURT: Excuse me a second. Sir?

MR. EMMONS: I object to the leading question and I object to the answer.

THE COURT: Sustained.

BY MS. SPAIN:

Q. Ms. Attaway, do you remember any other conversation that you had with Judge Lanier before he got up and turned around and grabbed you?

A. He told me—after I told him that was none of his business and I jumped up to the door, he said, "If you would have like it, we would have got along fine."

Q. What was he referring to?

A. If I had of liked oral sex.

\* \* \* \* \*

[264] CROSS EXAMINATION

BY MR. EMMONS:

Q. Ms. Attaway, of course, I am Wayne Emmons and I am Judge Lanier's lawyer, as you know. And I, of course, have a lot of questions to ask you. And if you don't understand any question, if you want me to repeat it for any reason, just let me know; okay?

A. Okay.

Q. Let's start with your employment right now. You are now working at First Citizen's Bank, correct?

[265] A. No. I am laid off from First Citizen's.

\* \* \* \* \*

[269] Q. Do you know that that is his bank and that he banks there, that the President is a friend of his? Do you know [270] that or not?

A. Yes.

Q. So, if he had wanted to retaliate against you when you got that job, he very likely could have, couldn't he?

A. I suppose.

Q. But he didn't?

A. No.

Q. Now, have you talked with—you say you are stressed out. We are all stressed out and I know you are stressed out. I am not criticizing that. Did you talk—

how many times have you talked to Ms. Spain or Mr. Castleberry and gone over your testimony here today?

A. I have read my transcript twice.

Q. And the transcript you refer to is the transcript of the grand jury testimony?

A. Yes.

Q. And have you had personal interviews with them, either Ms. Spain, Mr. Castleberry, Mr. Moskowitz, Mr. Parker, on numerous other occasions?

A. I don't remember how many times I have talked to them.

Q. Several times?

A. Several.

Q. And have these conversations taken quite some time?

A. Yes.

\* \* \* \* \*

[279] Q. There was no individual—I am not suggesting romantically involved—but was there not a male friend that came by on numerous occasions, a friend of yours?

A. Now, I had friends come by, but they never stayed.

Q. Was there not one particular individual that came by?

A. I cannot name a particular individual.

Q. Wasn't that mentioned to you as one of the reasons that you were not doing your job well?

A. No.

Q. As a matter of fact, he never fired you, did he?

A. Yes, I was fired, but the slip said I was laid off. But how would you take it? He told me, he said, "Things just aren't working out, you need to find another job." I took that as being fired.

Q. Well, was that when you went back with your keys and you told him you were quitting. He implored with

you and said, "You don't have to quit, keep working until you find another job."

A. He did not say I did not have to quit. He said, "Don't you want to stay until you find something else."

Q. But that doesn't sound like a firing to me. Does that sound like a firing to you?

A. Yes, it does. What else was it supposed to mean?

[280] Q. Well, let me see if I've got it straight what happened. He says, "Things aren't working out, therefore you need to find another job." But he didn't tell you to leave right then, or today, or tomorrow, or give you two weeks notice. He simply wanted you to begin looking for another job, when you found one, go leave, correct?

A. Yes.

Q. You made the decision to leave, then, didn't you?

A. I handed him the keys, I left, yes.

Q. You were very angry about this whole episode, correct?

A. I was hurt.

Q. I'm not talking about the allegations of being touched?

A. I was hurt.

Q. You're talking about in addition you were hurt, because you felt like—and you may have been—you felt like you were a good secretary.

A. He had told me I was doing a very good job.

Q. And he didn't feel like you were doing the job, apparently, and so that caused you to be very hurt with him; is that correct?

A. Yes. My feelings were hurt very bad. I thought I had been doing a very good job. Like I said, he had told me I was doing a good job. And I just could not believe he was [281] letting me go.

Q. And this made you very angry?

A. It made me hurt. I was hurt, I cried. I can't say I was angry because I was hurt.

Q. And in regard to these allegations about sexual misconduct, those were never reported to anyone except this one girl friend of yours, or cousin; is that correct?

A. That is who I talked to, yes.

Q. Tina Brock.

A. Tina Brock, yes.

Q. And she worked there in the same office?

A. No, juvenile office.

Q. She was his employee also?

A. Yes.

Q. But that is the only living person you ever told this until the FBI sought you out, correct?

A. Yes.

Q. So, you were hurt and mad about being fired, but not hurt or mad enough about what you say happened between you and him, or even tell anybody about it?

A. I was—it is very disgusting what had happened. I was embarrassed, it is not something that you would go around and tell somebody. It is humiliating.

Q. Why would it embarrass you because he did that?

A. It is just embarrassing.

[282] Q. So, you didn't report it to—you didn't tell your husband about it?

A. No.

Q. Nor your parents?

A. No. I told no one but Tina.

Q. And you kept going back day after day, didn't you?

A. To work?

Q. To work.

A. Yes.

Q. You kept subjecting yourself to what you have testified to where this physical touchings that were unwanted?

A. I thought he would quit. And like I said, I had to have a job. My husband was making maybe a hundred dollars, you know, a week. He worked according to the weather. I couldn't just up and quit a job. I have a child

I had to get to school. We had bills we had to pay. I could not just up and quit my job.

Q. There were other jobs, weren't there?

A. It takes so long to find a job. I have been looking for a job for months, now, and I can't find a job.

Q. Why did your husband quit his job?

A. Why did he quit his job?

Q. During that period of time.

A. He was working second shift and we did not spend any [time together.]

\* \* \* \* \*

[286] A. Mr. Kelley told me he was going to appeal it. He told me, I didn't say anything to him.

Q. All right. He did do that?

A. Now, yes. I have found out, yes.

Q. Did you go see Judge Lanier, originally, to try to get a job or to try to influence him about that case?

A. I went for a job.

Q. Did you talk to him about the case?

A. No.

Q. Did you try to?

A. No.

Q. Did he try to talk to you about the case?

A. No.

Q. When you went back into the courtroom with your attorney to hear the motion for a new trial, was he not on the bench?

A. I was not present.

Q. Okay. Do you know from your attorney whether or not he refused at first to have anything more to do with your case because you are now working for him, unless both attorneys agreed to do that?

A. I do not know what they said, I was not—I did not know anything else about it until Judge Lanier laid the case on my desk and had "motion granted". And I looked and it [287] was my case.

\* \* \* \* \*

[295] Q. Were there not in fact numerous scheduling mixups regarding the Judge's calendar while you worked as his secretary for that short period of time?

A. No, I only recall that one.

Q. Part of the clothes you wore that he objected to was a sleeveless knit tops, is that correct, or not?

A. I don't own any sleeveless knit tops.

Q. He didn't say anything to you about that?

A. No. I would not wear sleeveless knit tops anyway.

Q. You stated very strongly that you are not scared of him. You said that you weren't going to let him get the best of you, so to speak. You kept going back time and time again, did you not, at the same time alleging that he was molesting you all of this time?

A. I don't understand what you are asking me.

Q. Did you keep going back time and time and time again?

A. I had a job, of course I had to go back. I was working for him.

Q. Well, after you quit your job, you went back time and time and time again?

A. No, I did not go time and time again. I went for a separation notice and then I went to get a letter of recommendation. That is the only two times I ever came into contact with him afterward. As a matter of fact, he came to me one other time.

[296] Q. What about the time you called him and wanted to know, after all of this had occurred, if he could help you with the power of attorney? Have you forgotten that?

A. Yes, I had forgotten that, you are correct on that. My father had left town and wanted to give me power of attorney of his house. And he asked me if I knew somebody to call to see how we did it. I called the Judge. The Judge told me that he could do all of the paper work, for me to come see him. I did not go, we went somewhere else.

Q. But you called him?

A. Yes, I did call him to ask him. I knew he would know, he can't do anything to me on the telephone. I knew that.

Q. You knew other lawyers in town?

A. Yes.

Q. Worked for some of them?

A. No.

Q. But you knew them well?

A. I knew Charles Kelley from being my attorney. I knew other lawyers from working with the Judge.

Q. You know Janelle working up there at Charles Kelly's office?

A. Yes, I know Janelle.

Q. You know all of the other lawyers that come into court there, correct?

\* \* \* \* \*

# TRIAL TRANSCRIPT

(December 3, 1992)

[369] VIVIAN ARCHIE,

The said witness, after having been first duly sworn, was examined and testified, as follows:

## DIRECT EXAMINATION

BY MR. PARKER:

Q. Could you state your name, please?

A. Vivian Archie.

Q. Okay, Ms. Archie, how old are you?

A. Twenty-six years old.

Q. And where do you live now?

A. In Winterpark, Florida.

Q. How long have you lived there?

A. It will be a year December 29th.

Q. Where did you live prior to that?

A. In Dyersburg, Tennessee.

Q. And how long did you live in Dyersburg?

A. Approximately twenty-four years.

Q. Did you grow up there?

[370] A. Yes, I grew up from childhood.

Q. Growing up there, did you know David Lanier?

A. Yes, I did.

Q. How did you know Mr. Lanier?

A. From the time I can remember, he was the Mayor of our town and my house was very close to his house. I was friends with his older daughter.

Q. Which daughter is that?

A. Leigh Ann. And my little brother was friends with his younger daughter, Robbie.

Q. Okay. Did you all ever socialize together as children or his family?

A. Yes. I can remember one occasion that I was over at their house and played in the tree house with

Leigh Ann and we, you know, spent the summer's at the country club swimming pools, and Christmas dances that the Eight Graders put on, we were all in that. And through high school, you know, she was a cheer leader, I was a basketball player. And even though she was the—I think she was the football cheerleader, but we still—you know, athletic teams, we did things together.

Q. All right. Were you ever married?

A. Yes.

Q. When were you married?

A. Oh, wow. October of '88.

[371] Q. All right. Now, how long was that after you got out of high school?

A. Four years.

Q. How long were you married?

A. It was about—well, I was divorced in June of '89.

Q. All right. Was it an abusive relationship?

A. Yes.

Q. Did anything good come out of that relationship?

A. My daughter. I have a little girl.

Q. What is her name?

A. Her name is Ashley.

Q. How old is she today?

A. She is three.

Q. Who has custody of Ashley today?

A. My mother.

Q. Have you had trouble with your parents?

A. Yes, a lot.

Q. Like what?

A. They have kidnapped her before and taken her away and I had to go through a big custody battle to get her back.

Q. All right. Eventually—you can pull that box around there, if you want.

(Witness crying.)

When this investigation started, was there a lot of pressure on you?

A. Meaning?

[372] Q. Was there a lot of pressure on you and the dispute with your family?

A. Oh, yes.

MR. EMMONS: Your Honor, I am going to object to leading questions. They have all been leading up to this time.

THE COURT: All right. Mr. Parker, avoid leading questions.

MR. PARKER: I'm sorry, Your Honor.

BY MR. PARKER:

Q. Because of this pressure, what did you do with Ashley, as far as—

MR. EMMONS: (Interjecting) If The Court Please, we would object to that.

THE COURT: Rephrase your question.

MR. PARKER: All right.

BY MR. PARKER:

Q. Did you do anything with Ashley as far as custody was concerned?

A. Yes. I couldn't bear to live in Dyersburg anymore. So, even though they had fought me and I had gotten custody back, I had to do something to get my life back together, so I signed a consent order giving temporary custody of my daughter to my mother until I could get it together.

Q. Now, let me take you back to the summer of 1990. Did you have a job?

A. I had a job for a while at Cole Chiropractic Clinic, [373] but then I had a cyst rupture on my ovary and I had to go in and have surgery. So I was off work for like six weeks within that time. And when I went back to work, I had wanted to go back to school and Dr. Cole wouldn't work with me on my hours so I ended up quitting.

Q. Okay. I may have gotten a little ahead of myself. Let me go back to your marriage for one second. You say it lasted a year?

A. Yes, sir. It was June.

Q. Did it end in a divorce?

A. Yes.

Q. What judge heard that divorce?

A. Judge Lanier.

Q. And who was awarded custody by Judge Lanier?

A. I was.

Q. Now, you were out of work in 1990 after the surgery, is that correct?

A. Right.

Q. What type of pressure was at home regarding that?

A. Oh, it was horrible.

Q. Where were you living?

A. I was living with my parents, my daughter and I were living with my parents. And my father is a real workaholic and he just—he was really on me to get a job. You know, he said that I was—he would call me "lazy," "no good," [374] and things like that all of the time, even though I was out looking for a job, it didn't matter because I didn't have one.

Q. Did you ever hear about a job in the courthouse?

A. Yes.

Q. How did you hear about that?

A. My friend, Lisa, told me.

Q. Lisa who?

A. Golden.

Q. Where did she work?

A. She was a juvenile officer.

Q. Who did she work for?

A. Judge Lanier.

Q. What did you do to try to get this job?

A. I took my resume one day and I knocked on the door because there wasn't a secretary there, of course. And I just slid it under the door.

Q. I'm sorry, what door?

A. The chambers door.

Q. At the courthouse?

A. Yes.

Q. Did you talk to anybody that day?

A. Not that day.

Q. Did you get a call from anybody after that?

A. No, I went a couple of days later when I hadn't [375] heard anything and I took my resume again, and I went to the secretary's door and there wasn't anyone there. I went to the courtroom window and looked in and no one was there. And I knocked on the chambers door and you know, no one answered then. So, I went to—

Q. (Interjecting) Now, which door, where was this door in the courthouse? You keep calling it a chambers door.

A. It was the door right here (indicating) like by the hallway.

Q. In the hallway?

A. Yes.

Q. All right. We will pull that out in a minute and go over that. What happened when you knocked on that door?

A. Well, at first no one answered, so I went to the phone and called Lisa and she said to go back and knock again. So, I knocked harder this time and Judge Lanier answered the door this time.

Q. All right. What happened next?

A. He invited me to come in and I told him—you know, I handed him my resume and told him what I was doing, that I wanted to apply, fill out an application for the secretarial position there.

Q. All right. What did he say?

A. He said that he would look over my resume and give me an application to fill out.

Q. All right. Did you fill out an application?

[376] A. Yes.

Q. Where was this at?

A. In the chambers.

Q. All right. Where was he sitting?

A. At his desk, at his chair.

Q. Where were you sitting?

A. I sat across from the desk, like. It would have been in the one chair.

Q. Okay. What did you talk about?

A. Well, we didn't talk much about my resume. He started talking about—he mentioned my father had been to see him. He asked me how my family was doing, how things were going at home. He said—we talked about Leigh Ann and her newly born son. And we just talked about—you know, like I said, he started asking me questions about my father and me getting along.

Q. All right. Did he ever tell you why he was asking about whether you got along with your father or not?

A. He said that my father had come by and had told him things, and like that I had a boy friend. And he told me about—he told me Cain's name. He told me my father was saying I wasn't being a good mother and that he was interested in seeing about getting custody of my daughter.

Q. Okay. So, the judge told you that your father came over and wanted the judge to take custody away from you of [377] Ashley?

A. Yes.

Q. How did that make you feel?

A. Scared. My daughter is my life.

Q. What did you say to the judge when he said that?

A. I asked him was he going to take her away from me. (Witness crying.)

Q. What did the judge say?

A. He said—and then he started telling me that he couldn't talk about it, that the laws were that he couldn't talk about it. That he is the judge and he has to hear the cases.

Q. All right, he wouldn't tell you anything other than what your father said?

A. Huh, uh.

Q. What happened next?

A. Well, he told me that he had already promised the job to one of Bubba Agee's friends, and that it wouldn't be opened for long. He was going to fill it pretty soon. And I asked him then, I said, "Well, you know, I would really do anything for a job, I really want to work." "If you hear of anything, would you please keep me in mind."

Q. When you said, "I would do anything for a job," what did you mean?

A. I mean that I had worked on a farm for my father, and I had worked in the office. I would do any type of work, I [378] wanted to do something. I just wanted a job, you know. I would be a floor sweeper if I had to be.

Q. And why did you want a job so bad?

A. To get my parents off of my back so I could support my daughter. I was scared that if I didn't have a job and couldn't support her, that that would give them leverage to take her.

Q. What happened next?

A. I was getting ready to leave and I reached across the desk to shake his hand bye, and when I did, he wouldn't let go of my hand.

Q. Now, let me ask you. Let me back you up a second. At that point in time, who was the person who was going to have to decide who would take your child away from you?

MR. EMMONS: I object to that, Your Honor. That is a legal conclusion.

MR. PARKER: Let me rephrase that, Your Honor.

THE COURT: Rephrase it.

BL MR. PARKER:

Q. At that point in time, what was your understanding as to who would take the child away from you?

A. It would have been in Chancery Court and Judge Lanier would have heard the case.

\* \* \* \* \*

[382] Q. While he was standing over you, did you scream loud and for everybody in the courthouse to hear?

A. No.

Q. Why not?

A. I was scared. I was scared he would hurt me, or he would take my baby away from me and nobody would believe me.

Q. Nobody would believe you. Why is that?

A. Because he had all of this power. He could do anything he wanted to do.

Q. After you went in the bathroom and shut the door, what was the next thing that happened?

A. I cleaned up my mouth and I cleaned up my face, and everything. And I got ready. I got my nerve up and I opened the door and I just started walking real fast to go straight to the side door to get out of there, and—

Q. (Interjecting) Is there a way out other than past the judge?

A. No. I had to go back past his desk.

Q. Go ahead.

A. And as I was leaving, he started asking me, "Well, let me give you something for your troubles," and he was reaching into his back pocket to get his wallet out. But I just ran, I don't—I just ran.

Q. Which door did you run out?

A. The side door that I had come in, the one going to [383] the hallway.

Q. The hallway?

A. I ran down the steps. I had parked my car right by that entrance, that set of stairs. And I just ran right out.

Q. I know you said he hurt you when he pulled your hair and shook your head. At any other time was there any other time he—

A. (Interjecting) He was gagging me when he was in my mouth. He kept doing it harder and harder and I couldn't stop him. I was trying to push him out and push him away, and I couldn't, and he was just doing it harder

and harder. And it was hurting my throat. I have TMJ problems and it was hurting my jaws.

Q. TMJ is a medical problem with your jaws?

A. Yes.

Q. It causes pain in your jaws?

A. Yes. From a car accident.

Q. When you left the courthouse, where did you go?

A. I went riding by myself to my father's farm.

Q. Why did you go there?

A. Because that is where I grew up when I was a little girl and it was safe and I could talk to myself, you know. I could try to get it together before I had to go back to my family's home and face my mother, my father, and my little [384] girl.

Q. Did you go report it to the law enforcement people at all?

A. No.

Q. Why?

A. Because it wouldn't have done any good.

Q. Why is that?

A. He was the judge, it wouldn't have mattered. Nobody would listen and I would look like a fool.

Q. Did you go tell the District Attorney's Office, the prosecutor?

A. God, no.

Q. Why not?

A. It was his brother.

Q. The Judge's brother.

Q. What did you do?

A. I rode around and I buried it. I buried it inside and I tried to pretend that I had done something else all day, that I had just been on an interview. I tried to forget it.

\* \* \* \* \*

[385] A. I went home to my little girl and I took a bath. I went home and she sat there in the bathroom with me when I started cleaning up some more.

Q. All right. Why did you take a bath?

A. Because I felt dirty all over. It wasn't just what he did, I just felt dirty. I wanted to wash it away, I wanted it to go away.

Q. What else did you do that night?

A. I don't know.

Q. You didn't have any other contact with the judge that evening?

A. No, I did not.

Q. When was the next time that you heard anything from the judge?

A. It was a couple of weeks later. He called and left a message. Our housekeeper had taken a message that he had called and knew where there was an interview for me that I could go to.

Q. Did you call him back?

A. Not at first.

Q. Why not?

A. Because I didn't want to see him again, I didn't want to go back. I didn't want to face it, I was trying to bury it and that would make it come back.

Q. Did you tell anybody what happened?

[386] A. I said some things but not really in detail. I talked with just some friends and just told them that I was scared of him.

Q. But you didn't tell them what actually had happened?

A. No, I never told them what—I never got into details.

Q. Why did you not tell anybody the details?

A. Because I still thought that they would blame me and that if I told people—I was embarrassed of it. I was humiliated. I didn't want to tell them that this man did this to me, and that I wasn't weak—I mean, that I wasn't strong. Everybody thought I was a strong person and it would admit weakness.

Q. Did anybody besides your maid tell you that Judge Lanier had called about another job?

A. Oh, my mother.

Q. Tell us about that?

A. Well, my mom, when she first walked in, she saw the message. And she asked me had I called. And I said, "No." And she said, "Why not?" And I said, "Well, I have just been busy, I haven't had a chance yet." She said, "Well, you need to call him." "You better call him, if you don't call him, your daddy is going to be mad." "He is a good man and he can find you a job, and he is doing this, and he is doing that to get you a job." "You better call him."

[387] Q. Was she talking about your daddy?

MR. EMMONS: Your Honor Please, I have got to object to hearsay.

THE COURT: I don't believe it is being offered to prove the truth of what is being said. The objection is overruled. Go ahead.

BY MR. PARKER:

Q. You said he is a good man. Was your mother talking about your father or somebody else?

A. She was talking about Judge Lanier finding me a job.

Q. So, what happened, how long did that continue?

A. For about thirty minutes, or longer. Everywhere I would walk in my house, or in her house, she would follow me. And she would say, "Are you going to call." "Well, are you going to call?" "Why haven't you called yet?" "Why aren't you calling?" "You better call." "Your daddy is going to come in and he is going to go off." "You better call."

So, finally, I couldn't take it any more. I picked up the phone right in front of her and I called him. And I called and he said that he had a job interview. And I said, "Where," and he wouldn't tell me. He said, "You will have to come back over here and I'll tell you."

Q. Did you ask him again to tell you where?

A. Yes. I said, "Can't you just tell me right now, I am on a short time limit, I've got several other job [388] interviews." "Please just tell me now." And he says, "No, I've got to go now." "Be here at ——" He said, "The interview is at 12:30, be here at 12:00 o'clock."

Q. All right. Did he give you any information at all about where the job was?

A. Not anything.

Q. Based on that, what did you do?

A. Well, I got a dress on. This time I thought, well, I will wear a one piece dress where he can't reach up my top, you know. And I was really trying to stumble around and take a lot of time. I wanted it to be where I didn't have much time that maybe I could just run there and have to leave because the interview was going to be, you know, just any minute, and it would take me time to get there. So, I thought, well—and I was piddling around and piddling around, and my mom was then riding me then saying, "You better hurry up, didn't he say 12:00." I was like, "Yes, mom." "Yes, mom." And I was still trying to piddle around and like touch up my makeup or do anything I could think of to waste a little time, you know.

Q. All right. Now, did you go to the courthouse?

A. Yes.

Q. After this first incident, why did you go back to the courthouse?

A. Because I knew if I didn't go, my mother would find out. She would have called him and found out. And I was [389] scared if I didn't go, that he would get mad, that he would start thinking I had been talking, or something, and that then he would take my daughter.

Q. When you went to the courthouse, where did you go?

A. I went back to the secretary's office, and everything, just to see if maybe he was around there where I

could stay in that area, but he wasn't. So, I went and I knocked on the chamber door again.

Q. All right. What happened?

A. He came to the door and he invited me in. I was scared to go back in, so I kind of stood in the doorway, halfway in the hallway and halfway in the chambers holding the door open because his phone rang and he went to answer the phone. And I was standing there, and he motioned for me to come on in. And I was real scared, so I looked around a little bit and I decided to sit in the chair closest to the door this time where I could have my hand, you know, really close to the doorknob there.

\* \* \* \* \*

[395] A. Because I had his—I had his in my mouth. He had an orgasm in my mouth.

Q. Semen?

A. Yes.

Q. You had to spit it out?

A. Yes (crying).

Q. You went to the interview and you got the job (crying)?

A. Yes.

Q. Do you need to take a break, Ms. Archie?

A. No, I want to go on.

Q. When was the next time that you saw Judge Lanier?

A. When we had lunch at Capasa.

Q. When you say we—

A. (Interjecting) I had lunch with a friend and we saw him there.

Q. Who was the friend?

A. Dr. Warner.

Q. Your boss?

A. Right.

Q. What is Capasa?

A. It was a Mexican restaurant that he owned the building of, that Judge Lanier owned the building of.

Q. Did Judge Lanier sit at the table with you?

A. Yes.

[396] Q. How did you feel?

A. Very scared.

Q. Did you show that to the Judge?

A. No. I tried not to. I tried to just act like it was every day—you know, just every day.

Q. Had you reported anything by the second incident?

A. No.

Q. Why not?

A. Because if he got mad at me, my child's custody matter was in his court and he could take her away from me. I was scared. I was scared of being humiliated and this whole story being turned around and me looking like the bad person again.

Q. At Capasa did he say anything to you?

A. He asked me if I had said anything to anyone, and he asked me when I was coming back over. That is one thing he had told me both times that I had come over and he had done that to me, he had told me, "Well, will you come back," "Will you come back once a week," "Will you come back—" And I just was running. I would just run.

Q. Was anybody else sitting there when he said that to you?

A. He said it as we were getting ready to leave. Everybody was kind of paying their bills and going their own way, taking care of their own check. So, he kind of—[397] there were people around but he said it in a low voice. I was just walking by him and he said it. And I just looked at him and said, "No," and just kept walking. I was by myself in my own car. I had driven and met them, so I just ran on to my own car and drove away.

Q. All right. When was the next time that you saw the Judge?

A. Uh, either another lunch at Capasa or it could have been when he came in as a patient.

Q. Did he ever say anything else to you about these incidents?

A. Yes. There were occasions also that I was in the courthouse visiting with my friends and he would see me in the hallway and he would ask me, "Have you said anything?" "Have you told anyone?" And "Why haven't you been back, why aren't you coming back to see me?"

Q. Did he say anything else?

A. He would ask me has anybody talked to me. You know, has anybody contacted me, is anybody talking to me, am I talking to anybody. He would ask me how my family life is doing now.

Q. Meaning what, how did you interpret that?

A. Like, well, he has allowed me to keep my daughter right now, but if I open my mouth, then he's not gonna.

Q. Would he say that—

A. No, he only would imply it.

\* \* \* \* \*

[419] [Ms. Archie:] A. Yes, I was doing drugs.

[Mr. Emmons:] Q. My question is you were heavily involved in drugs?

A. Yes.

Q. Just as you got heavily involved again in drugs after this incident?

A. I took it one step further after this incident. One step that I am not very proud of.

Q. Well, let me ask you this. That is when you voluntarily gave custody to your mother and father?

A. My mother, right.

Q. To your mother?

A. Yes.

Q. Well, does your father live with your mother or not?

A. Yes, but she is not [on] the consent agreement. I mean, he is not on the consent agreement. It is just my mother and I.

Q. But he lives there?

A. Yes.

Q. And to whom did you go to try to get that consent agreement signed?

A. Who did I go?

Q. Who did you go to, what judge?

A. Actually, I believe Judge Riley is the one that signed it.

Q. Who did you go to first? Did you not ask Judge [420] Lanier to sign it?

A. Did I? No, sir, I did not. My mother had asked John Palmer to draw up the consent agreement. I went over, read the agreement before I left town and signed it. After that, I did not appear in court or anything. I don't know what avenues it went. I know that Judge Lanier had said to Sherry one time that he could sign it. But then for some reason or another, I found out that it had been interchanged over to Judge Riley's court.

Q. Well, you know for a fact working in law offices in Dyersburg, that Judge Riley can hear custody and child support, and divorce, just like Judge Lanier can, don't you?

A. No, I did not. I thought everything had to go to Chancery Court and then be interchanged if there was a conflict, was my understanding.

Q. How many law offices did you work at in Dyersburg?

A. One.

Q. And did you take papers over to the courts many times for other lawyers?

A. Yes.

Q. And Mr. Kelly's law firm?

A. Yes, I did.

Q. Now, you said you went to Florida to get your life together. And this was what, about a year ago?

A. Right.

\* \* \* \* \*

[433] Q. And you felt like that this man could just do anything he wanted to do?

A. No, but I felt like after he did it, he had the power to cover it up.

Q. And that nobody would believe you?

A. That's right.

Q. Absolutely nobody?

A. I had talked—you know, I had talked to people who had gone to other attorneys, and they didn't want to get involved. Nobody wanted to help us until a friend went to the FBI.

Q. Well, did you think that Dyersburg was the only place that had lawyers or police officers, or people that would listen to you?

A. No, but I have humiliation from this, and I didn't want to talk about it. I wanted to bury it, to cover it up, because it wasn't doing anything but tearing my life worse apart, when nobody—when you go to everybody and they just turn you away, and they just tell you that they believe you, but they can't do anything.

Q. Who was it that told you that?

A. They did not tell me personally, they told a friend of mine.

\* \* \* \* \*

[435] Q. You thought he had power over the FBI?

A. I didn't know. I was afraid to go to anyone at first.

Q. What I am asking you, Ms. Archie, is don't you remember in 1985 or '86 that the FBI, through their investigation, deposed the sheriff of Dyer County?

A. I remember newspaper articles. I was away at school at the time. I wasn't in Dyersburg.

Q. Did you have friends in Memphis that you could talk to about it, or elsewhere?

A. Friends in the legal community or friends—

Q. (Interjecting) Or in the law enforcement community or elsewhere?

A. As I said, I was humiliated. I didn't want to talk to anybody else because I knew I would be turned away,

so I didn't go to anyone. I just stayed back and tried to deal with it inside.

Q. Well, please explain to me why you went back up there the second time?

A. Because my mother followed me around the house. And she kept saying, "When your daddy gets home and he finds out that the judge has called you and knows where a job is, he is going to get mad, he is going to be furious." "He is going to kick you out of the house." And I have been kicked [436] out before, but not with my daughter. And I was trying to protect her and myself, and I knew if I got him mad that he might take her anyway, that it might be a vendetta, and I don't want to lose my daughter. (Crying)

Q. Are you saying you are more afraid of your mother than of Judge Lanier?

A. I am not saying I am more afraid, but I am very afraid of my mother, yes (crying). She has had a lot of power over me through my life. And she has made me do things that I am not proud of.

Q. The same word "power" again?

A. Yes.

Q. Did you ask your mother, "Come on Mom, let's go up to Judge Lanier's office and see what he wants"?

A. No.

Q. Did you go by the juvenile office and say, "Lisa Golden, how about going with me up to the office, Judge Lanier has got an interview that he wants to tell me about"?

A. No.

Q. Do you know Rob Hammon?

A. Yes, I do know Rob (crying).

Q. One of the juvenile officers.

A. But he was not working there then.

Q. Well, who was?

A. Sandy Sanders and Lisa.

\* \* \* \* \*

[443] Q. But you had asked him on the phone for the name?

A. Uh, huh.

Q. And you stated he said, "No, I can't give it to you on the phone, come on over." Now, if he is what you say he is, wasn't that an open book to tell you what was going to happen?

A. Yes, it was. And like I said, I tried to get myself seated in another seat. I tried to keep it where my hand would be right there by the door where I could swing it open and slide right out and get away, because I parked even right there by the steps where I could just run right down the steps right out by the door coming into the hallway and down the steps.

Q. And you are telling this jury that you expected it to happen, you say?

A. I expected to be able to get the answer to my questions of who it was and get out of there and protect myself.

Q. You had not gotten that answer over the telephone so why would you expect him to give it to you in person? Why did you think he said come down there in person, if what you [444] told the jury—

A. (Interjecting) I was afraid not to go. If I didn't go, then he would have a reason to believe I had told somebody. Maybe he would have thought that I was out there running my mouth and he would have gotten mad. And he is very vindictive (crying). He can make your life miserable. And without my daughter, my life is miserable (crying).

Q. But that misery that you have now has nothing to do with him or anything you say, does it? It has to do with your voluntarily giving up custody of your daughter to a woman that you say is mean to you?

A. It has to do with getting through this trial, and getting here with me. But at the time—this is a very emotional time for me. And it is not very good for a small child to be around someone that sometimes sits in

a chair and for no apparent reason just starts bawling. And I can't raise my child like that being a neurotic person. I am trying to get through this, get over it, and get her with me where she belongs (crying).

Q. Didn't you in fact get very angry at Judge Lanier because he wouldn't sign the voluntary custody transferring to your mother?

A. No, I did not.

Q. I never asked him to. I tried to stay away from that man after that. I don't know what you are talking about.

[445] Q. When the FBI first came to you, what did they ask you?

A. They asked me if I knew Judge Lanier. And I told them yes. And they asked me had I had a case in his court, and I said yes. And they asked me if I knew anything about other people coming forward and saying things that he had done to them. And I explained what I did know.

Q. Did you explain to them the things that you have testified to here today?

A. Yes, I did. I was going into that. I told them then that he also had done some things to me. And they asked me to explain and I did.

Q. On the second occasion you described where you finally got the name of the potential employer, and it was Dr. Warner; correct?

A. Yes.

Q. And you went and got the job with Dr. Warner?

A. Yes.

Q. Got it that day?

A. Yes.

Q. Started working that day?

A. Yes, I did.

Q. And how long after that were you at lunch with Dr. Warner?

A. You mean how many days?

[446] Q. How many days and times?

A. How many times? How many frequent times?

Q. How long did it take you before you were going to lunch with Dr. Warner?

A. It was probably within a week.

Q. Were you in fact having a romantic relationship with Dr. Warner at that time?

A. Yes, within a week.

Q. This is the man that you told Mr. Parker that you were in love with?

A. Yes. I was at a very bad point in my life and it wasn't—it was romantic in the terms of he was a very dear friend, he was a good shoulder. My father and I, the day before I started work—not the first day that I just went, but there was a day in between that I worked that afternoon after the interview. The next day, I took off to baby-sit for a friend. My father that night got mad because I didn't go straight to work, and we had a physical fight. I went back to work the next day and Dr. Warner asked me what was wrong, and I told him about the physical fight with my father.

Q. Within a week you were having a physical relationship with Dr. Warner?

A. Within a week it was verbal and later it became physical, yes.

[447] Q. And that is the gentleman that you went to Nassau with?

A. Yes, the gentleman that took me and Judge Lanier, who paid both of our ways, right?

Q. Who was it?

A. Dr. Warner paid our way.

Q. You and Judge Lanier went?

A. Right.

Q. Did you ever tell Dr. Warner about this?

A. Yes, I did.

Q. And he still put you in the company of this man?

A. He wanted to say something to Judge Lanier but I begged him not to. I begged him to not get him mad

at me, not to let him know I had opened my mouth to let me just stay as far away from him as I could and for him to stay with me and protect me.

Q. This was before you went to Nassau?

A. This was talked about before I went to Nassau.

Q. So, he goes down and pays the plane fare for this man, your attacker, and puts him up in a hotel room right next to you with connecting doors, doesn't he?

A. I don't remember there being connecting doors.

Q. Right next to you?

A. Right next to us, right.

Q. And then goes off during the daytime—Dr. Warner [448] went down there to see about a business deal, is that correct?

A. Correct.

Q. Correct? A box company.

A. Yes. And he asked Judge Lanier to come along for advice.

Q. And he was gone most of the day and Judge Lanier was there by himself at that point?

A. Judge Lanier was with him.

Q. Well, he was not with him when he came out to the beach where you were that time?

A. But I had asked Dr. Warner to let me go to the beach by myself. He was not away from the motel, he himself was in the motel. When they went off to the box company without me, they went together and I was left alone then, and I felt safe because he was with Dr. Warner.

Q. But you are saying Dr. Warner let him get away, he slipped off with Dr. Warner somehow and came running back to you?

A. He came to the beach, right, when I was reading a book.

Q. And Dr. Warner wasn't there?

A. Right.

Q. And then after you came back to Dyersburg, where did you carry on your love affair with Dr. Warner?

[449] A. We went up to the penthouse that Dr. Lanier had.

Q. Judge Lanier's apartment, correct?

A. He had given Dr. Warner a room that Dr. Warner had fixed up, and Dr. Warner [had] a key that we went on our schedule.

Q. And many times you went up there and Judge Lanier was there and you would have been waiting for Dr. Warner?

A. No, I did not. I never entered the apartment without Dr. Warner there. I was not with a key, I was with no way in that place without Dr. Warner first being there to answer the door or to go in with me. And I only ran into Judge Lanier twice there, and both times Dr. Warner was strictly by my side holding my arm and escorting me out. We never stopped and talked and carried on conversations, or did anything. We were completely going in and out.

Q. At Judge Lanier's apartment, did you eat lunch together on occasion?

A. Dr. Warner and I did, yes.

Q. But not Judge Lanier?

A. No.

Q. Did you go out with him and eat dinner or lunch with him on occasion?

A. With who?

Q. Judge Lanier and Dr. Warner.

A. Dinner or lunch?

Q. Yes.

[450] A. I met them, meaning them, a whole group of people. There would be Charles Kelly, Bob Malar, Steve Davis, and several other attorneys. Bubba Agee and one of his friends. They would all be at a table at Capasa and Dr. Warner would ask me to join them, and I would. I would join Dr. Warner and the other people were already there. I never directly ate with him at all.

Q. How long did your situation with Dr. Warner last, your romantic situation with Dr. Warner?

A. It ended whenever—when my parents kidnapped—

MR. PARKER: Your Honor, can we approach the bench?

THE COURT: Yes, sir.

\* \* \* \* \*

[Testimony of Patty Mahoney]

[466] [Ms. Mahoney]: A. Yes, I met with him in his office.

[Mr. Moskowitz:] Q. At the courthouse?

A. Yes.

Q. And was this for the purpose of interviewing for work with Judge Lanier?

A. Yes.

Q. Did Judge Lanier describe your duties and responsibilities that you would have if you were to be hired as a secretary during that interview?

A. Yes, he did.

Q. What did he say to you about that?

A. That I would set appointments or hearings with the attorneys in town and some light typing, answering the phone. That was all.

Q. What was your understanding at that time as to who would be in a position to hire you for that job?

A. The judge.

Q. And what was your understanding as to who would be your supervisor once you were hired?

A. The judge.

Q. And what was your understanding as to who would have the power to fire you once you got that job?

A. The judge.

Q. Now, how would you—let me ask you this. Would you describe the conversation with Judge Lanier at that time as [467] being basically professional and cordial?

A. I think it was a friendly interview. It was inappropriate when the interview ended because—

Q. (Interjecting) Well, what happened. Let me ask you, how did the interview end?

A. Um, after we talked about the job for a minute, or for a while, I stood up to leave. He stood up and walked around his desk and hugged me.

Q. What kind of hug was it?

A. It was a friendly hug.

Q. Nothing dirty or bad about it?

A. No, huh, uh.

Q. What was inappropriate about it?

A. It wasn't the right place to do that. I did not feel comfortable with it. I knew that it was not the right thing to do, it was inappropriate.

Q. Had the judge ever hugged you before?

A. No. We were not friends.

Q. Had anything led up to his hugging you?

A. No.

Q. What did you do or how did you react after the Judge hugged you like that?

A. I probably giggled. And he said, "I hope you don't mind that, we are very friendly around here." And I said, "I guess not."

[468] Q. Did anything else happen during that interview?

A. No.

Q. Were you hired on the spot that day?

A. No. He told me to come back the next day and type. He wanted to see if I could type.

A. And did you do that?

A. Yes, I did.

Q. Okay. Returning to taking this typing test the next day, did you have some concerns?

A. Yes, I did. I was worried because of the hug, I didn't think that was the right thing to do.

Q. Did you have some sort of plan in mind as to how you might handle the Judge on the day you went back for the typing test?

A. Yes. I was going to have a talk with him. I had planned to talk to him about it and get everything upfront.

Q. Now, when you returned to the courthouse for the typing test, what part of the courthouse did you go to?

A. I went upstairs to the—I don't know if it is the child division office or exactly what it is called.

Q. But it wasn't back in the Judge's chambers?

A. No.

Q. And did you have an opportunity to meet with the Judge that day?

A. Yes, I did. He came upstairs to visit with me for a [469] minute.

Q. And did you engage him in conversation as you had planned?

A. Yes, I did.

Q. What did you tell him?

A. I told him that if he had an ulterior motive for hiring me, not to do it, I was not interested.

Q. You made that pretty clear to him?

A. Yes, I did, I was adamant.

Q. And what did Judge Lanier say to that?

A. That he had no ulterior motive for hiring me other than as a secretary.

Q. Did you believe him?

A. I still felt uneasy.

Q. Something about the way the Judge acted towards you that day that made you feel uneasy?

A. Yes.

Q. Were you ultimately offered a job with Judge Lanier following your typing test?

A. Yes.

Q. Did you take it?

A. Yes.

Q. Despite the fact that you were feeling uneasy?

A. Yes.

Q. Why?

\* \* \* \* \*

[472] Q. Now, you say you worked for the Judge for about two and a half weeks or so?

A. Yes.

Q. And you quit?

A. Yes.

Q. Why did you quit?

A. Because it became clear to me that he was not going to leave me alone.

Q. What did he do to you?

A. He touched me—something happened every day. There was a hug, or there was a touch every day.

Q. You say a touch every day. Where would Judge Lanier touch you?

A. My breast and my bottom.

[473] Q. Your breast and your bottom. How would Judge Lanier touch you every day on your breast and bottom?

A. Uh, you know, I think the first couple of days, or maybe just the first day, it was kind of like an accident. And I wanted to think that that is what it was although I had my doubts. But the second day, it had already escalated to it was a firm touch.

Q. I know this is embarrassing for you.

A. Yes.

Q. But you do need to describe for the jurors what you mean by a firm touch?

A. Uh, well, it was with the open part of his hand, the palm of his hand.

Q. And how would he place the palm of his hand on your body?

A. Well, just firmly. Just firmly. It was there, there was no mistake.

Q. And where on your body did he do that?

A. My breast and my bottom.

Q. Did you want him to do that?

A. No.

Q. Did you ask him to do that?

A. No.

Q. Did you do anything to invite him to do that?

A. No.

[474] Q. How did you react when he did that?

A. I moved very quickly away from him.

Q. Did you say anything to him?

A. One day I might have been there three or four days by this point. He did something, I don't know which one.

Q. Did he touch your breast that day?

A. Either my breast or my bottom, I don't remember which.

Q. In the way that he had always been doing?

A. No, it was a little bit more aggressive that day.

Q. How do you mean more aggressive?

A. Well, it was—there was more of a squeeze instead of just placing his hand there.

Q. He actually squeezed your breast?

A. Yes. Yes.

Q. So, it wasn't a touch then, exactly?

A. Not really, no.

Q. It was more of a grab?

A. He never just grabbed me, it was always—he was standing beside me and he would reach over and do something.

Q. Would there ever be any warning before he would do that?

A. No. No, but I knew that I did not want to be alone with him, that something was going to happen. I tried to avoid that.

[475] Q. Now, you were saying on the day that he actually applied squeezing pressure on your breast, you finally said something to him and you said something on that day?

A. Yes, I did.

Q. What did you tell him?

A. I said to him—I walked very quickly away from which ever room we were, and it was probably in the storage room. But I walked very quickly back to my office and he followed. And he sat down, and I said how can you do this to me, you don't know me that well, for all you know I could run out of here screaming about what you just tried to do to me.

Q. And how did the Judge respond to that?

A. He said, "I don't think you will do that because it would hurt you more than it would hurt me."

Q. Was he joking?

A. No, he wasn't joking.

Q. Did you believe him?

A. Yes.

Q. How could it be worse for you rather for him if you said something about him?

A. Okay. Well, as I said before, when I was growing up, I heard about the Laniers. They had always been in power. I knew that. And I was afraid that nobody would hire me if I told people what he had done.

[476] Q. Why would nobody hire you if you told people that the Judge was grabbing you?

A. I would probably be viewed, I thought, as a trouble maker, or somebody that was just angry about something.

Q. Were you concerned at all about what the Judge might do?

A. What do you mean?

Q. If you had told anyone?

A. Oh, yeah. Oh, yeah. I thought that he would—

Q. What was your concern about?

A. Well, I knew or thought that he would tell people—if I applied for another job and somebody called me in for a reference, that he would say bad things about me and I wouldn't get a job.

Q. And so it would go worse for you than for him?

A. Yes.

Q. After you told him this and discussed this with him about going to someone and complaining about it, and his response to you that it would go worse for you, did the touchings and the grabbings stop or did they continue?

A. They continued.

Q. On a daily basis the whole time you worked there?

A. Yes.

\* \* \* \* \*

[479] Q. You say the Judge was angry, did he have a pretty bad temper sometimes?

A. Yes.

Q. Did the Judge want to do more with you than just to touch you and grab you or your breast and buttocks?

A. Yes, I think so.

MR. EMMONS: I object to the form of the question, Your Honor, and also the answer. We've got a leading question and then we have got an opinion answer.

THE COURT: Do you want to rephrase that question. I'll sustain the objection. Ladies and gentlemen, disregard the last question and answer.

BY MR. MOSKOWITZ:

Q. Did you have any indication from the Judge that he wanted to do more with you than just grab you on the buttocks?

A. Yes.

Q. What indication did you have?

A. Well, he called he at my home. He invited me on trips to the Bahamas, and he said to me that, "If you will sleep with me, you can do anything you want to. You can come in to work any time you want to, you can leave any time you want to."

Q. How did you handle that when he would bring up these invitations and enticements to you, how did you deal with it [480] generally?

A. As if it were a joke, that he wasn't serious when he said that.

Q. Why did you handle it that way?

A. Because it was easier to do that. I did not want to make the Judge angry.

Q. Did there come a time, Ms. Mahoney, when you decided to just call a halt to this and end it, stop it?

A. Yes.

Q. What did you decide to do?

A. I decided to quit.

Q. Did you notify the Judge of your decision to quit?

A. Yes, I did. I called him from my home. I called him and told him that I was going to quit.

Q. Did you really want to quit?

A. No, huh, uh.

Q. Did you have really some other hope or purpose in mind when you called on the phone and told him you were going to quit?

A. He asked me why, and I said, "You won't leave me alone." And I hoped that when I said that, he would say, "If that's all, if you really mean that then I'll leave you alone." But that is not what he said.

Q. Now, the next day, did you go back to work?

A. Yes, I did.

[481] Q. Had you changed your mind about quitting over night?

A. No, but I still had hope.

Q. What was your hope?

A. That I could talk to him and reason with him, and I tried to appeal to his sense of dignity, and honor, and integrity.

Q. How were you going to appeal to the Judge's sense of dignity, and honor and integrity, how were you going to do it, what were you going to do?

A. I said this, "You have a wonderful position. You are in a job, you have so much power and—"

Q. Now, you were going to tell him this, is that what you are saying, you were going to engage him in conversation?

A. I had already—yes. Yeah, I was going to tell him that.

Q. After one of those meetings, you went back to work the next day?

A. Yes. I had already talked to him about dignity and honor, but that didn't work either.

Q. Now, the next day when you returned to work, did you in fact have a conversation with the Judge about all of this?

A. Yes, I did.

Q. Where did that conversation take place?

[482] A. It took place in his chambers.

Q. And what was the purpose of this meeting, from your point of view?

A. Again, I wanted to keep my job, but I wanted him to leave me alone.

Q. And how were you going to do that, what was your plan?

A. On how to keep my job?

Q. Yes.

A. To appeal to his sense of honor again.

Q. And did you do that?

A. Yes, I did. I was distraught, you know, I broke down and cried.

Q. Are you pretty emotional?

A. Yes.

Q. Did the Judge see you crying?

A. Yes.

\* \* \* \* \*

[485] Q. Did you continue to work for the Judge several more days after that?

A. Yes. I told him the night I called him to tell him I was quitting, that I would stay there for another week.

Q. And did you keep that promise?

A. Yes, I did. He told me just a couple of days after that that the secretary who was there before me was going to come back to work for him.

Q. What was the purpose of working several more days after that incident, why did you make that offer?

A. Because I needed the job, and if I could hold on a couple of more days, or—you know, I really thought that after I told him that I was going to quit that he would be frightened of me.

[486] Q. Frightened of what?

A. That I would tell people what he had done or I would report him to somebody. So, I thought I had a little—safety net.

Q. Did you in fact tell anybody?

A. Tell him—

Q. Anyone in authority? Did you go to the police?

A. No.

Q. Or the FBI?

A. No.

Q. Or the District Attorney's office?

A. No.

Q. Did anything happen the last several days that you worked for the Judge after you had quit and stayed on, anything happen between you and he?

A. No.

Q. Now, after you left the employment of the Judge, were you able to find another job quickly?

A. No. No, I decided to go back to school.

Q. And before you decided to go back to school, while you were looking for another job, did you telephone the Judge for a job reference?

A. Yes, I did. I had a friend in Nashville and I thought that that might be a good move for me. And I called the Judge to see if he would give me a reference, if I [487] decided to apply for a job in Nashville.

\* \* \* \* \*

[492] [Mr. Emmons:] Q. And where was that?

A. I'm working at Maurice's, a clothing store in Dyersburg, part time.

Q. Part time?

A. Uh, huh.

Q. A retail establishment?

A. Yes.

Q. Did I understand you to say that you basically sort of manipulated the Judge there at the end by trying to keep him on the good side of you?

A. I guess so.

Q. In other words, you didn't tell him your true feelings?

A. No. No, I had—no, I got that straight with him, or tried to get that straight with him at the very beginning before I took the job. No, he knew how I felt about it.

Q. You said that you didn't want to burn any bridges, correct?

A. Right.

Q. And you felt like he had a lot of contacts to help you?

A. Yes.

Q. So, you wanted to keep the contacts, you didn't want to build the bridges, you didn't want to make him angry, so [493] you continued to talk to him?

A. I did not want to batter his ego and make him mad.

Q. I'm not talking about the physical touching that you have alleged, I know you say you disapprove of that. I'm talking about even after all of that, you continually—you carried on a relationship further with the Judge?

A. Well, I wouldn't call it a relationship at all. There were a couple of phone calls, that's it.

Q. Well, didn't you talk to him about some very vivid things, about relationship with men?

A. No. I never had an intimate conversation with him about my sex life.

Q. I didn't really mean your sex life, I meant about who you were dating, why you were dating, where you were going, this type of thing?

A. There was never any sex talk about me and what I was doing. As a matter of fact, I told him that I was a recycled virgin.

Q. Maybe I need to make it clear again. I am not talking about sex talk.

A. I don't understand what you mean.

Q. I'm talking about who you were dating?

A. Oh, yeah. Okay.

Q. Where you were going?

A. Yeah.

[494] Q. You called him about dates with Mr. Riley, here, that brought you up today, correct?

A. Discussing our platonic friends, I believe he would testify to that.

Q. That's is what I said, I wasn't talking about sex talk?

A. Yes. Yes. We did have personal conversations, sure.

Q. And you talked about going to the ball game with him, and you would see him where you all ate, and when he came by, just pretty long conversations about little social details, right?

A. Uh, huh, yes.

Q. Friendly chatter?

A. Yes.

Q. And you say now you were doing this just to manipulate—or you didn't want to burn bridges?

A. Right.

Q. You wanted a recommendation?

A. Yes.

Q. You in fact were kind of intimate, weren't you, you weren't expressing your true feelings?

A. Oh, you know, I think most Southern women grow up, or most women, I don't care where you live, with the idea that if you are divorced men are going to

come onto you. You learn how to handle it pretty quickly and pretty young. And [495] you do that by joking and caring on, light conversation, pander.

Q. Did you tell him about guys that wanted to date you that you didn't want to date because they were just interested in sex?

A. I don't remember that.

Q. Do you remember someone named Johnnie that you talked to him about?

A. Um, yes.

MR. MOSKOWITZ: Your Honor, may we approached the bench?

THE COURT: Yes, sir.

(Whereupon, counsel approached the bench, and the following occurred out of the hearing and presence of the jury, as follows:)

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MR. MOSKOWITZ: Mr. Emmons is getting ready to get into a prior sexual situation with this witness, which would be in contravention of the Court's ruling not to do [496] so.

MR. EMMONS: To the contrary, I was going to ask about a guy that she wouldn't date because—I have the name in my notes. It is my understanding it is one that she had not had any relationship with, but that she intimately talked to the Judge about why she didn't. When I say intimately, just a general conversation about it.

MR. MOSKOWITZ: Well, I think he had been allowed to get into the fact that she has had some personal conversations with the Judge about matters like that in general. And now we are getting into an area that is going to be extreme[ly] embarrassing to her, because it is going to lead to her having to talk about a relationship that she had. It is extremely embarrassing for her and has nothing to do with this case.

THE COURT: What is it that you are going in to?

MR. EMMONS: It was a person that she told Judge Lanier that she wouldn't go out because he was just a cunt handler and a pussy kisser.

MR. MOSKOWITZ: What has that got to do with this case?

THE COURT: Wait a minute gentlemen, I believe he is handling it now, let's let him handle it.

MR. MOSKOWITZ: My point is that she is having intimate conversations with Judge Lanier that she says she [497] is trying to get away from.

THE COURT: I will allow you to ask her if she used that word in conversations with the Judge. I will not allow you to go into a relationship or to describe a person, or to ask her about her other relationships with people. Is that fairly clear?

MR. EMMONS: Yes, sir. And Judge, when I ask just the first name of her—

THE COURT: Just leave the names out of it. I don't see how the names are possibly relevant. What you are trying to do is establish and develop conversations about a personal nature and you can do that by going into the conversation itself without dealing with the relationship.

MR. EMMONS: While we are here to save another trip back over here, there is something else I'd like to proffer. We have evidence that she told the Judge about her former husband and her, as I understand it, and how she lured him down to Dyersburg, placed a tape recorder under the bed, engaged him in intimate sexual acts and then used the tape recording of it to attempt to blackmail him into paying child support.

I think this is relevant for several reasons. Number one, it is a deceitful act, it is blackmail. Number two, she has complained about—

THE COURT: When are you talking about?

[498] MR. EMMONS: I am talking about at a time after she moved to Dyersburg, which would have been

right after the same frame of time, because he came to Dyersburg to see his children, so, it would have been after she moved to Dyersburg when she told him. And she told Judge Lanier the details of how she had done this and how she had the intent to use it to blackmail him into paying child support.

I think it is proper not only to the extent she was talking about needing more money, plus it was a deceitful action.

Also, she has said several times how she talked to Judge Lanier about dignity and honor. And I think this is contrary to these modelistic overtones that she has exhibited from the witness stand, and that the jury has a right to the probative of it, whatever that might be.

THE COURT: Do you want to be heard?

MS. MOSKOWITZ: Well, as to the last part, there are no logical inferences or connection between her appealing to the Judge's honor and dignity and any events which she may have in connection with her ex husband. In respect to the other argument that somehow that evidences her untrustworthiness, whatever relevance it might have is clearly prejudicial. The inflammatory nature of that testimony would be so prejudicial. It is cumulative in term of evidence. It is inflammatory, it is prejudicial. [499] It goes right to the heart of 403 prohibition against getting into prior sexual acts, which is exactly what he is trying to do.

THE COURT: This appears to be past sexual conduct.

MR. MOSKOWITZ: Or past sexual conduct, and it involves a husband and ex wife, and we all know no one knows what goes on with two people.

MR. EMMONS: Your Honor, the relevant single fact that she would set him up using and abusing him that way, shows a true trait of character that this jury needs to know about to properly evaluate this witness. I don't think I could show if I just wanted to show it that she was sleeping with her ex husband.

THE COURT: Are you saying that she had a conversation with the Judge in which she stated she was going to use this tape recording to get an increase in child support.

MR. EMMONS: Let me be sure I'm right on that, Judge.

THE COURT: Okay.

(Mr. Emmons conferring with defendant.)

MR. EMMONS: I just wanted to be sure. That was my understanding, that she hold him that she was going to use it to get an increase in child support. She called his [500] home and put it on his recorder.

THE COURT: Called whose home?

MR. EMMONS: The coach's home, her former husband's home.

THE COURT: And put what on the recorder?

MR. EMMONS: Recording their sexual taped tape that she was using. In other words, she was—

THE COURT: (Interjecting) How is that blackmail?

MR. EMMONS: She had a boyfriend, Your Honor—I mean, pardon me, he had a girlfriend that she said I'll let the girlfriend know. And girlfriend, in fact, did know and her ex husband's girlfriend broke up as a result of this. She did ruin him. She threatened to and she did.

THE COURT: I don't know if that qualifies as ruining him. I don't mean to make light of it.

MR. EMMONS: I understand.

THE COURT: That might be a little bit of an exaggerated stand.

MR. MOSKOWITZ: I just don't see how that is relevant to anything in this case. I think he has made his point, that there were personal conversations between the two. That makes his point. Now, he wants to put on specific instances and that is only offered for the purpose to inflame the jury.

[501] THE COURT: Well, he is indicating that it is being offered for another purpose. I appreciate your disagreeing with him on it.

Mr. Emmons, that is a little bit closer than some of the other proffers you have made because if indeed those acts occurred, it might indicate some deceit, but given the circumstances you have indicated, a former husband and a wife discussing child support, having sexual relations, I am inclined to think that it has very little probative value. And what probative value it may have is substantially outweighed by the undue prejudice that it will create in this case.

MR. EMMONS: Let me just be sure for the record that I have properly explained it to the Court. Her former husband, who was a coach, football coach at Murray State University—I believe if you'll remember she has testified that she moved up to Kentucky and then after the divorce moved back to Dyersburg.

THE COURT: Uh, huh.

MR. EMMONS: He came to Dyersburg to see his children. The former husband had a relationship with a television reporter from Paducah, Kentucky, a close relationship. She lured him into a sexual encounter in Dyersburg, that is, this witness lured her ex husband into a sexual encounter in Dyersburg, surreptitiously tape recorded [502] it, and then black mailed him. Said she was going to let the girlfriend in Paducah know if he didn't increase the child support, and in fact did let her know, and it broke up the relationship.

THE COURT: That is what I understood you to be proffering and my ruling that I indicated earlier still stands.

MR. EMMONS: All right. Can I ask her about that as far as the type of intimate conversation she had with the Judge?

THE COURT: You can ask about her conversations, whether or not she had a conversation with the Judge

about her sexual relationship with her ex husband, but you may not go into details that you just described to me?

MR. EMMONS: All right, sir. I can ask her if she used the word "cunt" in describing it?

THE COURT: Yes.

MR. EMMONS: All right. Can I ask if there is anything else while we are still up here.

THE COURT: Yes, sir.

(Mr. Emmons conferring with defendant.)

MR. MOSKOWITZ: I understand the ruling is that he cannot get into anything more concerning other men.

THE COURT: Well, I think I have already [503] indicated we are not going to discuss relationships between her and other men, but he may inquire into the nature of the conversation she had with the Judge for the purpose of establishing the relationship that she had with the Judge.

MR. EMMONS: That is what my understanding was.

(Whereupon, counsel returned to the counsel table, and the following occurred in the hearing and presence of the jury, as follows:)

MR. EMMONS: May I proceed, Your Honor?

THE COURT: Yes, sir, please do.

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BY MR. EMMONS:

Q. All right. Ms. Mahoney, a couple of more questions. In regard to intimate conversations with the Judge that I've talked about, did you not at one time, in referring to someone who you had talked with that wanted to date you, you referred to someone that you weren't going to do it because he was just a cunt handler?

A. Probably.

[504] Q. You told that to the Judge?

A. Yes.

Q. In one of these conversations.

A. I could have. I don't remember, but I have used that phrase before.

Q. Did you not also discuss some of the intimate details of your life with your former husband?

A. I don't think so, no.

Q. You don't think so?

A. No, I don't remember doing that at all.

Q. Would you not have remembered if you did?

A. No, I think I would remember if I had. I don't think I would have discussed that with him.

Q. You don't think you would have discussed it?

A. No.

Q. Your not denying it?

A. No. I don't remember ever discussing it with anybody.

Q. In regard to your former husband coming to Dyersburg to visit his children and what details went on of that situation, relating to child support?

A. Oh. Yeah, I did tell him one time that my ex husband made passes at me when he came to pick up the boys.

Q. Did you explain to the Judge that—did you ever talk to him about whether or not you submitted to any of [505] those passes for any purpose?

A. From my ex husband?

Q. Yes.

THE COURT: The question is not what you were doing with your ex husband, but with respect to what conversations you had with the Judge about those relations, if any.

BY THE WITNESS:

A. I don't remember.

Q. You don't remember whether you talked to him about it?

A. No.

Q. On one occasion that you have alleged that he engaged in these conversations with you about taking off as much time as you wanted to take off, if you would be nicer to him, or something like that. I forget exactly how you put it, but that was the gist of the conversation, right?

A. Yes. If I would sleep with him—

Q. That he would give you more time off?

A. I had never asked him for any time off, but yes, I could run the office pretty much is probably what he said.

Q. Did you in fact tell him in response to one such conversation, I am just interested in the money, if you will come up with a lot of money?

A. Jokingly, yes.

[506] Q. You said that?

A. I said, "Your crazy." I said, "I'm not interested in trips, I am interested in the money," and that was in my office where I felt very safe.

Q. Told him to come up with a lot of money—if you will come up with a lot of money, is that what you said?

A. Probably.

Q. Well, would you like me to show you your grand jury transcript?

A. No, I believe I said that. I remember the conversation, uh, huh.

Q. And I believe you also said—

A. (Interjecting) That was said in gist [*sic*: jest], I certainly didn't mean it. He said it could be arranged, and I said, "Your crazy."

Q. Said in gist?

A. I said it in gist, yes. And he said the money could be arranged, and I said, "Your crazy."

Q. Was this the man that you say had been sexually assaulting you every day, joking with him like that?

A. Yes, because that is what he liked to do. He liked to talk about sex.

Q. Now, did I understand you to say that one reason you kept going back day after day after day is because that you were afraid nobody would hire you if you didn't; is that [507] right?

A. If I didn't what?

Q. If you didn't go back and keep working for him, you were afraid that if he got mad at you nobody else would give you a job in town?

A. No, if I ran out and talked about what he—about the sexual harassment, nobody would give me a job.

Q. Well, Mr. Moskowitz was asking you about why you kept putting up with this, and you said because he was so powerful, I was afraid nobody would give me a job if I quit, that is why I kept going back; right?

A. I kept going back, I was there three weeks.

Q. Yeah. But you say you went back day, after day and he assaulted you every day there?

A. Yes.

Q. And did you not say that the reason you didn't just quit is because you were afraid you'd be on his bad side and nobody would give you a job?

A. Yes. I left the office with—everything was okay when I left the office, he wasn't angry at me.

Q. And the reason you kept going back is you were afraid nobody would give you a job? Let me ask these questions.

A. If I talked.

Q. At the grand jury, once you—Question: "Once you finally quit, you were concerned about getting another [508] job?" Answer: "No, not really."

MR. MOSKOWITZ: What page are you on?

MR. EMMONS: Page 10, line 11.

THE COURT: Give him an opportunity to find that, please.

MR. EMMONS: Yes, sir.

BY THE WITNESS:

A. No, I kept my mouth shut, I didn't talk about him. I thought everything was okay, and I felt free to call and ask him to help me get another job. I thought if I stormed out of the office for something that he had done to me, then that was it, I had cut my throat.

Q. You really weren't concerned about getting another job?

A. No, I thought I could get another job.

Q. Ms. Mahoney, is it not a fact that you had trouble fulfilling the requirements of that job?

A. No, I didn't.

Q. Are you saying that you didn't have trouble just with simple things like the proper way to answer the phone, picking up the mail, setting the cases?

A. The Judge was very angry if I asked anybody, "May I tell him who is calling." He did not want me to ask who was on the phone, and he did get angry at me about that one. But, you know, when you go to work every day and you expect [509] something to happen, you are nervous and it is hard to think, if that is what you are referring to.

Q. Well, what about picking up the mail, what was the problem picking up the mail?

A. Nothing. I think I forgot a couple of days.

Q. A couple of days?

A. Uh, huh. I don't even remember ever getting the mail, maybe I didn't.

Q. What was the problem with setting cases?

A. Nothing. The attorneys gave me compliments. They were glad—they told me they were glad that I was there.

Q. I'm sorry, say that again, if you would?

A. The attorneys gave me compliments. They told me—several of them told me that they were glad I was

there. You know, I was there a very short time, I didn't have the job down pat, but it was a very easy job.

MR. EMMONS: I believe that's all, Your Honor. Thank you.

THE COURT: Redirect?

MR. MOSKOWITZ: A couple of questions, Your Honor.

# [510] REDIRECT EXAMINATION

BY MR. MOSKOWITZ:

Q. Mr. Emmons asked you about some of the joking that went on between you and how you responded to him—to his sexual comments, and you would joke about it. Did the joking stop the abuse he was subjecting you to while you were working there?

A. Oh, no. No.

Q. When you told him that you might go to the police or the authorities, did that stop the abuse for the two weeks you were working for the Judge?

A. No, he seemed confident that I wouldn't do that.

Q. You said you tried to keep things calm and happy while you were working there?

A. Right.

Q. Not to rile him up in any way?

A. No, I didn't want him angry.

Q. Did that stop the abuse for the two weeks you were working there?

A. No.

Q. How did you finally stop the abuse you were getting while you were working for Judge Lanier?

[511] A. I quit.

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**TRIAL TRANSCRIPT**

(December 8, 1992)

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[Testimony of Fonda Bandy]

[809] [Ms. Bandy:] A. Presently I am employed for a federal program called Drug Free Public Housing.

[Mr. Parker:] Q. How long have you been employed through that federal program?

A. I started last year in July.

Q. Prior to that, how were you employed?

A. I had a business of my own.

THE COURT: I'm sorry, I couldn't hear you.

THE WITNESS: I had a business of my own.

BY MR. PARKER:

Q. What do you do with the drug free program?

A. Presently I am the [s]ite coordinator. The way that the grant is set up it is with a coalition. And the Dyersburg portion of the grant has the largest share of the monies appropriated, so I manage a two hundred and fifty thousand budget for the Dyersburg Housing Authority, which operates in five counties. We have different centers, learning centers and recreation centers, and we provide employment opportunities, tenant involvement opportunities, education and recreation for the tenants in public housing.

Q. Do you know David Lanier?

A. Yes.

Q. How do you know Judge Lanier?

A. I was introduced to him by a former business client of mine about four years ago and then I had a meeting [810] with him concerning the program.

Q. All right. Let me get to that. Tell us about this program that you had to have a meeting with the Judge?

A. Okay. When I started working with the program in July, one of the things that immediately came to my

attention was that there were several juveniles in housing that were before the court.

Q. Which court are you talking about?

A. Juvenile Court, Judge Lanier's court.

Q. Who is the Juvenile Court judge in Dyer County?

A. Judge David Lanier.

Q. Okay. Go ahead.

A. A lot of the problem that we had with the juveniles was that they were repeat offenders. And this wasn't the first time that they had been in court, and maybe they had been in court since they were nine years old, or whatever. A lot of the parents just do not have the educational levels that we do. They don't have a lot of job skills. It is very difficult for them to know how to handle their children or what would be best for their children, and so we have this never ending cycle.

After I had started working with one family in particular, I had thought that probably one thing that might help would be if we could implement a parenting program for the parents of these children in housing.

[811] Q. What do you mean by a parenting program?

A. Okay. There are different parenting programs at this time available. What it would do would be to introduce the parent to a positive guilt free type of take control with your children.

Q. When you say there are programs available, you mean these are programs that were already established in the Dyer County Area?

A. No, I mean the materials.

Q. What type of materials?

A. The manuals and the videos, and cassettes, that sort of thing. And you can get them where we call it undercutting, where you might be able to get a book at a regular reading level, or it will be undercut to like a fourth grade level, which is really good for the clientele that I work with.

Q. So, you were going to put on classes to teach parenting skills?

A. Correct.

Q. All right. Now, you said these were for juvenile offenders going through juvenile court, is that correct?

A. For the parents.

Q. For the parents of juvenile offenders?

A. Uh, huh, correct.

Q. How were you going to get these parents involved in [812] this class, how are you going to get them to come to the classes?

A. Okay. First of all, I want to back up a little bit.

Q. Sure.

A. There was one little boy in particular that I was working with who had a case in court at the time and he had gotten taken in. And so the mother was very very upset and she called me to her home. And as I had talked with the mother, I realized—she didn't know what restitution meant and she just did not understand the court system, et cetera, that she had to pay this fine that this boy had and he had to do that community service or, yes, they would come and pick him up. She just didn't understand all of this. And we got that explained, we established that she had to pay at least five dollars a month on the little boy's restitution charges. And because he had fifteen hours of community service work, I told her that I would be willing to supervise that at the Alvin Wood Center. It is a recreation center where I work. So, I had cleared this, first of all, with two juvenile officers at the time, probation officers, and that was Sandy Sanders and Lisa Golden, and we had all had a meeting and they thought it was a good idea.

In the meantime, I had talked to Paula Ledford about did she think that that would be a good idea. Paula is the Executive Director for the Housing Authority, did she think [813] that that would be a good idea to have a parenting class? I also take a lot of direction from Paula, as far as the programs that we try to create and

implement. Obviously, if she is not going to be supportive of it, there is not a lot of reason to go ahead and do it. But she thought that it was a very good idea and she said, I think that the first thing that you need to do is talk to Joe Boyd.

Q. Now, who is Joe Boyd?

A. At the time, Joe Boyd was the acting Attorney General for Dyer and Lake County.

Q. The Acting District Attorney General?

A. Yes, sir.

Q. The state prosecutor for Dyer County?

A. For Dyer County and Lake County.

Q. Okay. When you say acting, who was he filling in for?

A. James O. Lanier was sick at the time, and it was his office that because he was not able to fulfill his duties, Joe was in that position.

Q. Okay.

A. Joe is also the Chairman of the Board for the Dyersburg Housing Authority, and so that was kind of a double purpose there. The Chairman of the Board thought it was a good idea, plus being, you know, the Acting D.A. then, and we would just go from there. [814] So, Paula had called me and we went and met with Joe in his office. And he fielded several questions to me. He said, for example, the judge will want to know are you going to be able to vary your schedule. You know, you work primarily eight to five, but if a parent is working and they don't get off until five o'clock, how will you handle that. Well, we will make our hours flexible. He said the judge will want to know where are you going to counsel these people so that it will be private and no one else will know that they are there or will hear the conversation, and it was just that sort of thing.

And so I took notes and then Joe said approximately how long do you think that it will take, you know, to get this together. And I said, "Can you give me thirty days." And he said, "Fine."

Q. You needed to get a curriculum, and all of that, together?

A. Exactly, and a presentation for Judge Lanier for the parenting program that we wanted to do.

Q. What happened next?

A. Approximately thirty days later, I called Mr. Boyd back and told him that I was ready with the curriculum and the presentation, and I wasn't sure what to do at that point because I did not know whether he wanted to present it or whether he wanted us to both present it. And so did we need [815] to set down an appointment in our planners for us to both go and talk to Judge Lanier about this.

Q. What did you do?

A. And so Joe told me, he said, "Fonda, I think that you can handle that on your own," he said, "I have every confidence that you will be able to make a good presentation whether I am there or not, you go ahead and make the appointment." So, I called Judge Lanier and I made an appointment with him to talk to him about the parenting classes.

Q. Do you know what day you made that appointment?

A. It was September the 18th at 3:30 in the afternoon.

Q. September the 18th at 3:30. What year was that?

A. It was last year, '91.

Q. 1991?

A. Yes.

Q. How do you know that date?

A. On the same day, I also had a meeting—I was a guest speaker for the Kiwanis Club in Dyersburg, so I was there and then I had the meeting with Judge Lanier.

Q. Okay. Did you write it down any where?

A. I write everything down in a planner, I have a daily planner.

Q. Did you go back and check your planner?

A. Yes.

\* \* \* \* \*

[832] Q. When he reached out and touched you in your vaginal area, how firm was it?

A. I don't know. I mean, it wasn't like he grabbed, he just went like this (indicating). And I don't know if that was to stop me or exactly what that motive was, but I just hesitated and kept on going for the door.

Q. What did you do next?

A. He said—I kept going for the door and he followed me and he said that he wanted me to come back and see him. And I told him that I didn't think that that would be possible, and he said that he wanted me to come come back and see him and if I did come back to see him, he would make sure that I had all of the clients I needed.

Q. For the parenting classes?

A. Correct.

Q. Now, after this day, how many clients—let me ask you, did you ever go back and see him?

A. No, I did not.

Q. Did he ever call you and talk to you about coming back to see him?

A. He had called the office concerning two clients, and it was the case that he had in court before I had the appointment with him, and that basically is what that was about.

[833] Q. Did he say anything that day about you coming to see him?

A. I don't remember.

Q. Did he say anything about a schedule of any kind?

A. I don't remember.

Q. Okay. Now, you said that he ordered two people to participate in a parenting class before you ever went to see him? Other than those two people, how many clients did he ever send to your program?

A. None.

Q. None?

A. None.

Q. And you never went and saw him?

A. No.

Q. Why didn't you go back and see him if he wasn't sending clients?

A. Because I did not want to have to go through again what I had already been through before.

Q. Did anything happen to the funding for this program?

A. At one time, we were really on the wire. As a matter of fact, in July we all received termination notices. And I am not sure exactly what happened, our staff went from a staff of five to a staff of one, and I was the only one retained.

\* \* \* \* \*

[835] A. Correct.

[MR. EMMONS:] Q. Now, you are not connecting that in any way with any displeasure he had with you, are you?

A. Can you restate that, please?

Q. Yes. You are not connecting that funding problem with any displeasure he had with you, are you?

A. Any displeasure he had with me?

Q. He had no control over the funding of this program, did he?

A. Not that I know of.

Q. And so when you were asked that question and were getting that answer, it was implied that in some way he was controlling your program and giving you programs?

A. I didn't ask the questions, I just answered the questions.

Q. I understand. I just want to be sure that in responding to Mr. Parker's questions, that you weren't trying to leave that impression with the jurors. And now you say you were not, is that correct?

A. I said I didn't ask the questions, I answered the questions.

Q. Very well. As a matter of fact, the program was insulated in such a way so that Judge Lanier could have absolutely no control over it, could he?

A. The program is a federal program and it is funded by [836] HUD, and it is a coalition. My particular program is a coalition and there are ten housing authorities that are in the coalition.

Q. And HUD, of course, is a federal agency also?

A. Yes, sir.

Q. And the only thing you were seeking was more people to be in the program?

A. Correct. Clients for the program.

Q. Clients for the program. I'll come back to that in a minute, but let me ask you a couple of questions first. Have you talked to some of the other people who testified, some of the other victims in this case? I don't mean during the trial, but I mean prior to the trial?

A. I'll put it this way, I didn't know who the victims were until—and I still don't know who they all are, and no, if I were talking to them, I didn't know that they were victims.

Q. Did you make the statement that some of the women had a vendetta to get Judge Lanier?

A. I don't recall having said that.

Q. Did you tell that to Mr. Naifeh, or anything like that to Mr. Naifeh? Do you know Mr. Naifeh?

A. I have seen Mr. Naifeh before.

Q. Did he talk with you a few days ago about the case?

A. He called me on Saturday.

[837] Q. And did you tell him at that time something to that [e]ffect, that some of these women had a vendetta to get Judge Lanier?

A. I did not mean to imply, if I had said that, which I don't recall that I did, [they] were victims, because as I had stated before, I had not talked to any of the victims.

Q. It was somebody else that had a vendetta that you knew of.

A. Mr. Emmons, in a case like this, you lots, and lots, and lots of things, and no one knew for a long long time that I had any involvement. So, here I am up at the courthouse, where ever, Kiwanis Club, and this is something that people are talking about. Yes, I heard, lots, and lots, and lots of things.

Q. So that is where the term vendetta came from?

A. I don't know if I used that word.

Q. That was the implication to this gentleman?

A. Am I supposed to answer this?

Q. I guess maybe I didn't phrase it clearly. Was that the implication to Mr. Naifeh, the explanation that you have given just then?

A. I don't recall.

Q. Now, let me go back to the program, the federal program just a minute. A federally funded program through HUD, and you were interested in it because of your job with [838] the Dyersburg Housing Authority. Am I correct in that?

A. I am interested in the parenting program because—

Q. Was it connected with your job with the Dyersburg Housing Authority?

A. Yes. Yes.

Q. And exactly what was your job at the Dyersburg Housing Authority?

A. When I was hired originally in July, I was hired as an area counselor. And so we met and we talked with and counseled the various tenants. And then it was our

job to coordinate, to be a liaison between already established programs in the community. And so if the person needed—for example, if they wanted to finish a GED, then we would say these are the programs available, this is what you can do. If there were programs that were needed that was our first priority to connect them with programs already, you know, in progress. And then if they needed something additional or something that was not already being offered, for example, the parenting class, then we could go ahead and create and implement that program.

Q. When you say we, are you talking the counseling—

A. The staff.

Q. The staff?

A. Uh, huh.

Q. How many people made up the staff at the Dyersburg [839] Housing Authority, roughly?

A. By February of '92, there were five people on the staff.

Q. All right. Now, the parenting class, then, was something new at the time you went and talked to Judge Lanier about it?

A. Correct.

Q. It has nothing to do with job's counseling or whatever other counseling opportunities there were. This was a new idea or class to be offered to clients in the Housing Authority, or whoever, to assist in learning parenting skills?

A. Correct.

Q. Now, was this a separate federal grant?

A. No, no, this was under the grant that I was working on.

Q. Okay. Was the Dyersburg Housing Authority paid according to the number of people that were enrolled in the class?

A. No.

Q. It was a block grant of the nature where the number of people had nothing to do with it?

A. The nature of people on one hand doesn't have anything to do with how much money we get because the money is based on how many units the Dyersburg Housing Authority [840] had. But in order to get continued funding, you have to show that you are implementing those goals and objectives as set up in the grant. And of course, that is why you keep numbers as such.

Q. Let me see if I understand that, now. The money was there to do the parenting class, but to continue the parenting class, you have got to show that you used the money and that there was a need for it?

A. Exactly. You have got to show that you have people coming to any class or to any program that you have implemented.

Q. Now, in other words, the Housing Authority had a financial study in this parenting class being successful and being used?

A. No. See, the Housing Authority—this grant is really a different one. And as I had stated before, it is a coalition. There are ten housing authorities that is involved. We are a support program under resident initiatives for the housing authority. So, the only thing that the housing authority has to gain is that whenever they get their rating twice a year, or once a year, or whatever, that the programs that we have is going to make a difference on whether they get an a, b, c, whatever, under resident initiatives, which is a big part of their grading.

Q. But am I incorrect in my conclusion from what you [841] have said that the parenting classes were for the clients of the Dyersburg Housing Authority?

A. Yes, that's who I wanted, were the tenants.

Q. Tenants who lived in the Dyersburg Housing Authority?

A. The tenants that lived in housing that had children in juvenile court.

Q. So, it really didn't matter whether the judge went along with this program or not, you still had access to them through the Housing Authority, didn't you? You were just wanting him to order that they do that?

A. Correct.

Q. But it was still available to them regardless?

A. Correct.

Q. And he indicated no displeasure with the program, no obstacles in any way, did he?

A. No.

Q. And in response to Mr. Parker's question, you said that not much happened after that. Well, isn't it correct that shortly thereafter is when this investigation reached full bloom, and in May of last year, he was indicted? May of this year—pardon me—he was indicted?

A. Am I supposed to answer?

Q. Isn't that true?

A. As far as I know, I suppose that is true.

Q. So, didn't he have very little contact with anybody [842] as a juvenile judge during most of this period?

A. I don't know what kind of schedule he had or what he was entitled to do.

Q. The parenting class was an option for all members of the—all clients of the Dyersburg Housing Authority with or without the judge, is what I am saying, correct?

A. We went ahead, and in the Spring, yes, we offered the parenting classes across the board.

Q. All right. Without his assistance or without him even being there?

A. Correct. But see, whenever I first wanted the program to be implemented, I wanted to be able to help the parents of the juveniles, or the children that were in juvenile court, so that we could do something a little bit different in order to help the parent a little bit more. How much does it help a parent for them to pay a fine that they can't pay because they are on welfare, and then for the child to go out and to do the same thing again, or worse.

Q. Now, again, correct me if I'm wrong. If you were wanting to get Judge Lanier to expand this program, not to people that lived in the project, but to send you people that didn't live in the projects, didn't live in the housing authority homes?

A. No, I had never asked that. It was for the tenants because that is what our grant is for. It is for people who [843] live in housing.

Q. And that is all you enrolled in the program?

A. Basically, that is who we have enrolled.

Q. I'm not asking you basically, I asked you if that is all you enrolled in the program?

A. Are you saying programs or in the parenting programs?

Q. Parenting programs.

A. In the parenting programs, the two people that he sent me, the reason that I accepted it was because the child that was involved, the infant, the last address was Lipford Circle, which is in housing. So, even though the father didn't live in housing, he came to parenting, but that was the child's last address so that is kind of an iffy there, but we went ahead and let it go through.

Q. Now, when you say you didn't tell anybody about these things that you said that happened because somehow you didn't want him angry at you because of the funding, or because of the parenting program?

A. Could you restate that question, please.

Q. Did you say you didn't complain about these matters to anybody because you didn't want Judge Lanier angry at you because he might have some impact on your parenting program?

A. I don't think that it was the parenting program. Judge Lanier carries a lot of impact, period.

Q. I understand. We have heard that a lot. Tell me [844] how?

A. I think I already stated.

Q. Well, state it again?

A. That a judge—

Q. Not "a" judge, this judge.

A. In any county or community in any state, that is a position that deserves an amount of respect.

Q. I'm not talking about respect, I am talking about power. Where did he have any power over you or life, or your program?

A. Judge Lanier knows an awful lot of people.

Q. Well, he didn't try to harm your program in any way, did he? We're not talking about knowing people, we are talking about the charges you made that he has power and that he could have used it against you in your program. I am asking you how?

A. He told me if I would come back and see him, he would send me all the clients I needed.

Q. But did he tell you if he didn't, that he was going to scuttle your program?

A. He told me that if I came back to see him, he would send me all the clients that I needed.

Q. But your program was sitting on its own bottom with the Housing Authority, it had nothing to do with the extra clients that he might send you?

[845] A. I am just stating what was said.

Q. I know that you are just stating that, but how did he have power over you? We have heard that all week, now, explain it to me. How did he have power? He is a judge, he hears divorces. You had no divorce in his court?

A. No.

Q. He hears child custody and child support and you had none of that in his court?

A. No.

Q. He hears some law lawsuits, workmen's comp. You had none of that in his court? Yet, you are here saying that you did this and didn't report it because he had some power over you. What kind of power did he have over you?

A. I came in to ask him would be please help me with this federal program. And he said that if I came

back to see him, that he would see me all the clients that I needed. Now, what do you think that means?

Q. Let me repeat my question and let me restate my premise here. You told him this was a program that had to do with the Dyersburg Housing Authority clients, correct?

A. Correct.

Q. I'm afraid you're going to have to sit up to get to the microphone so we can all hear you. Now, you have also stated that the program continued to operate regardless of his input into it, correct?

[846] A. That is correct.

Q. So, the program didn't falter, fail, or stumble at all because you didn't go back to see Judge Lanier, did it?

A. I think that it could have probably been better.

Q. That wasn't my question. It is still there and it is still in place, isn't it?

A. Yes, it certainly is.

Q. You all are still getting funding because you are able to show the government that you have got people coming to your parenting classes?

A. To our various programs.

Q. Including parenting classes.

A. As outlined in the grant.

Q. And does that increase the salaries of the people at the Dyersburg Housing Authority?

A. No, this doesn't have anything to do with salaries of people at the Dyersburg Housing Authority.

Q. Does it have to do with employment, not salaries?

A. Not with the Dyersburg Housing Authority.

Q. With who?

A. I work for a federal program called Drug Free Public Housing.

Q. Does it have anything to do with the amount of money you are paid in the job you are in?

A. The amount of money that any position is paid is set [847] up at the time that the grant is written.

Q. Okay. And the continued funding is necessary for the continuance of the grant, correct?

A. Correct.

Q. So, again, I am back to my original question. How did he have power over you?

A. I think I have already answered that.

Q. Because he said if you will come back I will send you all the clients you need?

A. Correct.

Q. Were you afraid of him?

A. Yes, in the context that I don't feel like that whenever I go and talk to a professional person for a professional meeting, that I should be subjected to that.

Q. That wasn't my question. My question was were you afraid of his power over you? Maybe I can rephrase it. Assuming for the moment for arguments sake, that everything you say has happened, how did that relate to this man's position as the Chancellor of Dyer County?

A. The judge is a very political person in the context that he comes from a political family, has a notorious political background, he knows a lot of important people.

Q. Let's explore that a little bit. Comes from a very political family. Most of them are dead, correct?

A. I don't know that much about his family.

[848] Q. Well, you just expressed an—

A. Other than what I have read in the newspaper.

Q. His father has been dead for twenty some odd years, hasn't he? His brother James O. Lanier, who was a state representative and the District Attorney, has been dead for several years now, hasn't he?

A. I don't think several, maybe one or two.

Q. He is the only one left, isn't he?

A. As far as I know.

Q. And he hears divorce cases and worker's comp cases. How does that make you fearful of him because of all of this power? You didn't have any of those cases, did you?

A. (No response).

Q. I'll pass unless she wishes to answer.

A. I think I already have answered it.

Q. Did you go back and report this to Mr. Joe Boyd, the District Attorney?

A. No, I did not, not immediately, no.

Q. Not immediately. When did you?

A. The only time that I said anything to Joe Boyd about it was after the grand jury and a couple of telephone calls from the U.S. Attorney's office, I was under the assumption that the indictment would be coming down in January. And Joe—I like Joe Boyd a lot, he is a friend of mine. He is the Chairman of the Housing Authority. He has been very [849] supportive of our program and I told him at that time in January that I wanted him to know from me first before he read it in the paper or heard from anyone that chances are I would be named as a victim in this case.

Q. You were telling who that, now?

A. Joe Boyd.

Q. But that was long after this incident occurred?

A. That's correct.

Q. He sent you up there to Judge Lanier's office and said, you go make the presentation. Had no fear of doing that. Does he ever call you back and say well how did things go, or you not ever talk to him? You are very close to him, you say. Did you not ask or talk to him about how things went with the Chancellor, with the juvenile judge?

A. About maybe a month and a half or so later, I can't remember if it was before or after the grand jury for sure, you know, before the indictments came down, Joe and I were talking about this. And I said I'm a little bit disappointed with the number of people, as far as the parenting classes are concerned. And he told me that I probably did not need to see—and he said "David" right now.

Q. Well, did you tell him that the reason that you weren't getting anything from David was because he had told you to come back and see him and he would send you clients?

A. No, I did not elaborate that, no.

[850] Q. You didn't elaborate on that?

A. No, I did not.

Q. You didn't tell him about anything that happened to you on the day that you were there, did you?

A. No.

Q. And the reason that you didn't need to see David was because he was about to be indicted, and everybody in town knew that, and you told people that you might be one of the alleged victims?

A. I didn't tell people.

Q. Some people?

A. I went and told Joe.

Q. Who said, "Well, you don't need to go see David now if you are one of the victims"?

A. No, that isn't what I said. At one time, I had talked to Joe before the indictment. We were talking about the parenting class. And I said I was disappointed with the number of people in the parenting classes, I was disappointed with the situation.

Q. And the investigation was already going on and everybody knew about it?

A. Then in January I went and talked to Joe again and told him that I wanted him to know that more than likely I would be named. That I hoped that I wouldn't be, but more than likely I would be named.

\* \* \* \* \*

[862] A. He is still the judge.

Q. That is why you didn't report it?

A. Exactly.

MR. EMMONS: Would the Court give me just one moment?

THE COURT: Yes, sir.

(Counsel conferring with defendant.)

MR. EMMONS: Just a couple of more questions, Your Honor.

THE COURT: All right. Go ahead.

BY MR. EMMONS:

Q. Just to be sure I understand, basically, I believe you testified that you made no complaint at all to anybody until the FBI came and talked to you?

A. That is correct.

Q. And were you surprised that the FBI came and talked to you?

A. When they called me, I think I was shocked because, you know, the FBI, if you are not used to being called on something like this, it is a little upsetting.

Q. And they get your attention, do they not? How, many came to see you, two?

A. One FBI agent, one TBI agent.

Q. Would it have been Mr. Castleberry and Mr. Champine?

A. Yes, that's correct.

\* \* \* \* \*

[865] BY MR. PARKER:

Q. What was the reason that you went to the judge's chambers?

A. To talk to him about implementing parenting [866] instruction through order of his court of parents of juveniles.

Q. Mr. Emmons about beat the horse to death about why he [sic: you] didn't report this. I am going to ask you to look down deep inside. How did what the judge do to you make you feel?

A. (Crying) I went to the judge because I work in a program with a lot of underprivileged people who

need an awful lot of help, and I would like to think that there would be one person that would really help me and the program that I work for. I didn't go in for myself, my salary was going to be the same regardless of whether I got that program or not. I went in for six hundred people that I work for in housing, and I don't think I should have to be subjected to that from any person in any kind of position.

Q. And how did it make you feel?

A. I just felt really degraded and like he evidently didn't think that I was worth very much.

Q. Did that have any relation to why you didn't report this?

A. I don't think that this is something that you want to voice to too many people or that you want too many people to know about.

MR. PARKER: That's all I have, Your Honor. Thank you.

THE COURT: Thank you. You may step down.

\* \* \* \* \*

## TRIAL TRANSCRIPT

(December 9, 1992)

[960] THE COURT: All right, Mr. Emmons, do you have a motion?

MR. EMMONS: Yes, Your Honor.

THE COURT: Your Honor, I have a motion under Rule 29 for a judgment of acquittal on the proof at this point, and I would specifically request that the Court consider the motion as to right now since the government has closed its proof in chief. And I would rely primarily on much of what we have argued previously in pretrial motions. I think my motion is this; based upon the lateness of 18 242, I am very simply, which I am sure is not a surprise to anyone, arguing that under 18 241 and 242 that there simply has been no federal crime proved by the government in this matter. And I specifically rely upon the phraseology, "Whoever under color of law." For purposes of this motion, I am not alleging that there has been no deprivation of constitutional rights shown. I am satisfied that a deprivation of freedom on liberty from sexual assault is adequate. I am not as sure that that would include all of the complainants in this manner. I think there is one person, Ruby Sipes, where it is stretched to say that the exposing of the genitalia included—and I'm assuming her testimony to be true, and of course, that's all the Court has to go on at this time, that the [961] exposure of the genitalia, there is a question about whether or not that is a sexual assault, so I'll start with that one matter and comment very briefly.

\* \* \* \* \*

[Testimony of Donna McDevitt]

[1014] BY MR. EMMONS:

Q. Would you state your name, please?

A. Donna Forsyth McDevitt.

Q. Donna Forsyth McDevitt, is that correct?

A. Yes, sir.

Q. Keep your voice up loud enough for me to hear you and I think probably everybody else can. And where do you live, Donna?

A. At 531 Poplar, Dyersburg, Tennessee.

Q. And you are married?

A. Yes, sir.

Q. To whom?

A. Mitch McDevitt.

Q. And how long have you been married to Mr. McDevitt?

A. Twelve years in August.

Q. Do you have children?

A. Two, eight and four.

Q. Do you know Vivian Forsyth?

A. Yes, sir, I do. She is my sister.

Q. How old is Vivian, do you know?

A. Twenty-six.

Q. So, you are how many years older than Vivian?

A. Six.

Q. Six years older?

A. Yes, sir. Right at six. Her birthday is May the 26th, [1015] mine is August 23rd.

Q. You do know that she has testified in this case against the defendant, Judge Lanier?

A. Yes, sir, I do.

Q. Ms. McDevitt, do you have an opinion as to the honesty or dishonesty of your sister, Vivian Forsyth?

A. Do I have an opinion?

Q. Yes, mam.

A. Yes.

Q. What is that opinion?

A. That she is not very honest. She tells you what she wants you to know for what she thinks is appropriate.

Q. Do you think or think you know—you have stated your opinion. Do you know, or think you know, the reputation of your sister, Vivian Forsyth, in the com-

munity of Dyersburg, do you know her reputation among her friends, neighbors, and acquaintances for truthfulness?

A. Most of what I know, what I can do is base my opinion on my personal experiences.

Q. And that is that she is not a very honest person?

A. That's right.

MR. EMMONS: I pass the witness.

THE COURT: Cross examination.

\* \* \* \* \*

[Testimony of Leigh Ann Johnson]

[1030] [Ms. Johnson:] A. I didn't think she was qualified for the job. She hadn't had any experience with the word processor or with [1031] anything that she would have had to have been doing legally, you know, no legal background at all. And so I really didn't feel like she would be. But Daddy was out there the night that she called and when I hung the phone up I told him who it was and what she wanted, and I just told him that I thought she deserved a break, she had had a hard time and I wish that he would hire her because of that.

[Mr. Emmons:] Q. You sort of put in a good word for her?

A. Yeah, I did, I talked him into hiring her. He didn't want to hire her because she didn't have the experience and he told me that. He said, you know, she is not experienced, she is not what I really need. But I said everybody deserves a break and I think she is smart enough that she will catch on, if you will just give her a chance.

Q. Did you ever have any concerns about—or hear any concerns voiced about her daily appearance, for want of a better term?

A. When Sandy worked there—he did hire her as a secretary, and when she worked at the courthouse I was working upstairs in the courthouse. And she worn some clothes that were way too casual for the office. She needed to dress more specially and Daddy said something

to her right off the bat, and it hurt her feelings. So, then he came up and he said, okay, she is your baby, I hired her because of you, I want you to tell her that she is going to have to [1032] dress better, or dress more appropriately. She wore these pink—the day he came up there she had on pink knit pants with panties, no panty hose, and they were very thin. And she had on a half shirt, sleeveless and her bra was showing, and he was very upset about that. He said If I tell her again, I'll hurt her feelings and I don't want to hurt her feelings, so I want you to talk to her.

Q. And did you undertake to try to talk to her about that?

A. Yes, I did. She said—as soon as I have been working a while, I am going to get me some money and buy me some better clothes, but right now this is all I've got.

Q. Did you do anything specifically to help her get any kind of clothes as her friend?

A. Well, she bought some clothes from me. She paid, you know, for them, but she was—I felt like I did her a service or whatever.

Q. Did you sell them cheap to her?

A. Yeah, they were my samples from where my—I sold Faith Walker clothes and they were my samples, about four hundred dollars worth of clothes and I let her have them for a hundred and eighty dollars, and I let her finance them with me. And I was working part-time, had just had a baby, and really needed the money, but I let her have two or three months to pay for them. It was a hundred and eighty dollars and she was going to pay me like fifty dollars a month, but [1033] she never did pay me all of the money. She still owes me fifty dollars, and my husband can vouch for that.

\* \* \* \* \*

[1034] Q. Do you know Vivian Forsyth?

A. Uh, huh. I have known her all of my life.

Q. Do you have an opinion that you can state about whether or not she is an honest or dishonest person?

A. An opinion?

Q. Yes.

A. She is a pathological liar, she has lied all of her life about everything.

Q. How long have you known her?

A. We were in playschool together. We started out in playschool and had gone from there. When she was in high school, we went our separate ways. We were in a sorority together my Ninth Grade in high school, but then we went our separate ways. She was too wild for me.

Q. Do you know what, or think you know what her reputation—you have stated your opinion, I'm asking not for your opinion, but what her reputation is in Dyersburg among her friends, neighbors, and acquaintances, as to honesty or dishonesty?

A. She is dishonest.

Q. Did you ever talk to her at the courthouse while you were working out there?

A. Uh, huh. She came in and out, she was working for Charles Kelly, and she came in and out filing cases and stuff for him.

\* \* \* \* \*

[1037] Q. Why did you do that?

A. Well, because, I think that day he had had to answer his own phone, she wasn't getting the phone. And it was just something all of the time. She just had problems catching on and it was just something all of the time. And I think that day he had gotten onto her because he was having to answer his phone. And I just told him not to be so gruff with her. And after that he got onto me for getting onto him in front of her, because, you know.

Q. Did you ever hear him say to her in your presence that everybody is supposed to be afraid of the judge?

A. Huh, uh.

Q. Do you know Fonda Bandy?

A. Uh, huh.

Q. How long have you known Fonda Bandy?

A. Since August of '91.

Q. Do you know where she works?

A. She worked for Drug Free Public Housing in Dyersburg. It is through the Dyersburg Housing Authority, their office is outside the Housing Authority office. I worked at the Housing Authority, that is where I met her.

Q. Did you ever work with Fonda Bandy?

A. We worked on special functions together, like for the tenants.

\* \* \* \* \*

[1066] LARRY JOHNSON,

The said witness, after having been first duly sworn, was examined and testified, as follows:

#### DIRECT EXAMINATION

BY MR. EMMONS:

Q. Would you state your name, please?

A. Larry Johnson.

Q. All right, and Mr. Johnson, where do you live, sir?

A. I live at 1359 Don Hurley Road in Dyersburg, Tennessee.

[1067] Q. Now, are you related by blood or marriage to the defendant, Judge David Lanier?

A. Yes, sir, I am, by marriage.

Q. Who are you married to?

A. I'm married to Leigh Ann Lanier.

Q. How long have you and Leigh Ann been married?

A. We've been married for five years.

Q. Do you have any children?

A. Yes, sir, we have one son, two years old.

Q. Did you grow up in Dyersburg, Tennessee?

A. Yes, sir, I did.

Q. Do you know a lady named Vivian Forsyth?  
Vivian Archie Forsyth?

A. Very well.

Q. How long have you known her?

A. I've known her for at least ten years.

Q. Were you in school with her or did you know her folks or how did you know her?

A. Right after she was in school, I dated a real good friend of hers.

Q. How long did you date this good friend?

A. For about three years.

Q. Were you around Vivian during—considerably, during the time during that?

A. Yes, sir.

[1068] Q. I'll ask you if during that time and now, do you have an opinion as to whether or not she is a truthful or untruthful person?

A. No, sir, she is not a truthful person.

Q. And is that based upon your experiences with her and with her friends—

A. Yes, sir, it is.

Q. I'll ask you if you also, during that period of time, the time that you knew her, I'll ask you your opinion. I'm going to ask you now if you know or think you know her reputation in the community of Dyersburg for truthfulness or untruthfulness?

A. Yes, sir, I do.

Q. And what is that reputation?

A. Untruthful.

MR. EMMONS: I pass the witness.

THE COURT: Cross examination.

\* \* \* \* \*

[1075] KEITH UNDERWOOD,

The said witness, after having been first duly sworn, was examined and testified, as follows:

# DIRECT EXAMINATION

BY MR. EMMONS:

\* \* \* \* \*

[1076] Q. And did you know a lady working at Checkers or before or after, a lady named Vivian Archie Forsyth?

A. Yes, sir, I did. She was—

Q. How did you know her?

A. She was the waitress.

Q. At Checkers?

A. Yes, sir.

Q. How long a period of time did you work with her there?

A. Probably six months.

Q. During that period of six months associating with her, did you form an opinion as to her truthfulness or untruthfulness?

A. Yes, sir. In my opinion, it was formed for me, really, because my boss told me not to let her come behind the counter.

Q. I'm asking your opinion.

A. And my opinion was the same as his because she never told me the truth about anything.

Q. Now, as you say, your opinion. Let me ask you if you know or think you know what her reputation for truthfulness or untruthfulness was in the community in which she lived?

[1077] A. Okay, I know most everybody in Dyersburg and most everybody in Dyersburg will tell you that Vivian will lie, would rather lie than tell the truth and she'd lie for any reason to benefit her or to get her in a certain position or place.

MR. EMMONS: I pass the witness.

THE COURT: Cross examination.

## CROSS EXAMINATION

BY MR. PARKER:

Q. How long have you know Vivian?

A. Approximately twelve years.

Q. Twelve years? The fact that she would lie to you, would that give the judge the right to grab her by the hair and throw her in a chair and stick his penis in her mouth?

MR. EMMONS: Object to the question. What we're talking about is her credibility, Your Honor.

THE COURT: Do you want to be heard on that objection?

[1078] MR. PARKER: I withdraw the question.

THE COURT: Thank you.

BY MR. PARKER:

Q. Let me ask you this. While you may not think she's a truthful person, have you been in the courtroom during this case?

A. No, sir, I have not.

Q. Have you heard all the evidence of what happened in this case?

A. No, sir, I have not.

Q. Have you ever heard the fact that there are eight other women that very similar things happened to?

A. I don't know how many women at all and don't know all the women.

THE COURT: Ladies and gentlemen, without objection, I'm going to strike the last question and answer from the record and order you to disregard it. I have indicated to you earlier that each of these cases, each count is to be decided separately on its own and not with reference to each of the other counts. Go ahead.

MR. PARKER: That's all I have. Thank you, Your Honor.

THE COURT: Anything further, Mr. Emmons?

MR. EMMONS: No.

THE COURT: Thank you, you may step down.

\* \* \* \* \*

[1114] KATHY WALKER,

The said witness, after having been first duly sworn, was examined and testified, as follows:

## DIRECT EXAMINATION

BY MR. EMMONS:

\* \* \* \* \*

Q. And how long have you worked for Dr. Reid?

[1115] A. Well, I have been with him four weeks.

Q. Previously, what other jobs have you had just as a general rule?

A. We own six dry cleaners and Brassier's Bra and Tuxedo in Jackson.

Q. When you say we, who are you talking about?

A. Our family, the family. Walker's Cleaners.

Q. Are they located in Jackson, Tennessee?

A. Four locations in Jackson and one in Humboldt, and one in Milan.

Q. Okay. Do you know a lady named Vivian Forsyth?

A. Yes, I do.

Q. And can you tell me how long you have know Vivian Forsyth?

A. Since she was seven.

Q. Say it one more time?

A. Since she was seven.

Q. Since she was seven years of age?

A. Yes, sir.

Q. And in what capacity have you known Vivian?

A. I kept her on a daily basis when I worked for her mother.

Q. Who is her mother?

A. Judy Forsyth.

Q. And where did you work for her mother?

[1116] A. I worked at Forsyth's dress shop in Dyersburg.

Q. I'm sorry, I'm have trouble hearing you.

A. Forsyth's Dress Shop in Dyersburg.

Q. Okay. Forsyth's Dress Shop?

A. Yes, sir.

Q. Which is where?

A. It was at 427 Troy.

Q. Okay. And that is a business owned by Vivian's mother?

A. Right, that's correct.

Q. General ladies' apparel shop?

A. Yes, sir.

Q. How long did you work there?

A. Almost four years.

Q. And how old was Vivian at the time?

A. She was seven.

Q. And have you known her continuously since then?

A. Yes, sir. I mean—yes, sir. I know her. I have not kept in close contact with her, but I do know her.

Q. During the several years there that you worked for the shop, how close were you to Vivian?

A. Very close, I kept those children on a daily basis.

Q. Ms. Walker, do you have an opinion as to the truthfulness and untruthfulness of Vivian Forsyth?

A. She is an habitual liar.

Q. I'm not asking for a specific instance, but do you—

[1117] A. Well, she enjoys—anybody that would repeatedly tell lies about their own sister for their benefit and enjoy doing it, would lie about anybody, and she did that constantly.

Q. Now, in addition to stating that opinion to this jury, do you think—do you know, or do you think you

know, her reputation for truthfulness or untruthfulness in the community where she lives?

A. Oh, yes, sir.

Q. And what is that reputation?

A. An habitual liar, she does not know how to tell the truth. She tells lie after lie to get out of lies, just for—to benefit for herself.

MR. EMMONS: I pass the witness.

THE COURT: Cross examination.

\* \* \* \* \*

**TRIAL TRANSCRIPT**

(December 10, 1992)

[Testimony of Lyman Ingram]

[1163] CROSS EXAMINATION

\* \* \* \* \*

BY MR. MOSKOWITZ:

Q. Mr. Ingram, I think you testified that the public assumes a great deal of power in the Lanier family. Is that right?

A. Yes, it is.

Q. What do you mean by that? Would you explain what you [1164] mean by that?

A. Well, there are—over the years, Judge Lanier's father procured many jobs for people and if they wanted to get a job, many, many people went to Judge Lanier, Judge Lanier's father, about a job. If it was for the state or if it was for one of the local industries or what not, he accommodated and helped a lot of people that way. And he was the Ed Crump of Dyer County, if you know what I mean.

Q. I'm sorry, I didn't hear you. The Ed what?

A. The Ed Crump of Dyer County. Ed Crump controlled Memphis.

Q. I see.

A. And he was the Ed Crump of Dyer County and that general area, even to outside of Dyer County, and people perceive and get the idea, sometimes even falsely, of some people having powers they don't have that are from that immediate family. And I'm not saying that to say that Judge Lanier had all of that power but a lot of the public perceived that he did and that James O. did, that he was judge and James O. was District Attorney for a year before he died, and it's not what you actually have. I'm talking about what the public perceives.

Q. I understand. And Judge Lanier held other public offices besides judge, do you recall?

A. He had been mayor prior to being judge. He was mayor [1165] for several years, I don't know how many, probably fourteen—twelve to fourteen years.

Q. And I guess you would agree with me that in addition to this aura of power that you're talking about that Judge Lanier had with his family and his finances, that as a judge, he also was in a position to make important decisions on people's lives. Is that the assumption?

A. Well, every judge is, even down to a General Sessions judge because he has the power to put people in jail as General Sessions judge. All judges have decisions that they have to make, always affect people

Q. I suppose he had, he would have the power to decide, for example, in a divorce proceeding, correct me if I'm wrong, which parent would take custody of the child if there were a child in the divorce proceedings. Is that correct?

A. Yes, he would have that power.

Q. And he would have the power to either grant or not grant a divorce in certain contested cases?

A. Right.

Q. Some of these cases are very emotional, very involved in the complications involving families and money all sorts of very highly charged issues. Is that correct?

A. That's true.

Q. And also, I suppose, that as Chancery Court judge, Judge Lanier also controlled certain jobs in the courthouse, like [1166] secretarial positions and chancery court positions.

A. He appoints the clerk and master and what other jobs he has control of, I don't know. I'm sure the secretary, yes. But as far as the juvenile officers and so forth, I'm not familiar with how those are employed.

Q. And I think you testified, and correct me if I'm wrong on this, Mr. Ingram, that James O.'s son was a District Attorney for a period of time?

A. Assistant, yes.

Q. Assistant District Attorney.

A. Right.

Q. That would be Judge Lanier's brother's son?

A. That's correct. A fine young man.

\* \* \* \* \*

[1215] THE COURT: Would you stand and raise your right hand and be sworn by the clerk, please.

COLLEEN FLEMING,

The said witness, after having been first duly sworn, was examined and testified, as follows:

#### DIRECT EXAMINATION

BY MR. EMMONS:

Q. Would you state your name, please?

A. Colleen Fleming.

Q. And would you spell your name, both names, for the court reporter?

A. C-O-L-L-E-E-N F-L-E-M-I-N-G.

Q. And where do you presently reside?

A. 125 Lake Royal, Lewisburg, North Carolina.

Q. And you live there with your husband?

A. Yes, sir.

Q. What is his name?

A. Lyon, L-Y-O-N.

Q. And how long have you been married to Lyon?

A. About six and a half years.

Q. Do you know a lady named Vivian Archie?

A. Yes, sir.

Q. Forsythe Archie?

A. Yes, sir.

[1216] Q. How long have you known Vivian?

A. Ever since pre school.

Q. You have known her your entire—

A. (Interjecting) So, about twenty-three years.

Q. Twenty-three years?

A. Twenty-three approximately.

Q. Have you lived in Dyersburg for a long time?

A. Yes, sir.

Q. When did you move to Dyersburg?

A. About six years ago.

Q. How close were you to Vivian?

A. Well, we were best friends all of our life.

Q. Pre school, grade school and high school?

A. High school.

Q. Have you ever had a conversation with her regarding any things that she stated that—any matters regarding the accused, Judge David Lanier?

A. Yes, sir.

Q. Did she tell you whether or not she had had sexual intercourse with him, forced or not forced?

A. Well, she had—well, she told me that she hadn't ever had sex with the judge.

Q. Ever?

A. Ever.

Q. How long ago was this?

[1217] A. I'm really not sure of the time, I would say maybe two years ago, a year and a half. That is just a guess.

MR. EMMONS: I pass the witness.

#### CROSS EXAMINATION

BY MR. PARKER:

Q. You did say Vivian was a liar and you couldn't believe anything she said?

A. I never said that. I just—you know, I—

Q. Well, you said she has got a bad reputation for truthfulness, is that right?

THE COURT: I don't believe she did.

THE WITNESS: I haven't said that.

MR. PARKER: That's all I've got. Thank you.

MR. EMMONS: Thank you.

THE COURT: You may step down.

(Witness excused)

\* \* \* \* \*

[1252] STEVE GREEN,

The said witness, after having been first duly sworn, was examined and testified, as follows:

#### DIRECT EXAMINATION

BY MR. EMMONS:

Q. Would you state your name, please, sir?

A. Steve Green.

Q. How old are you?

A. Thirty-six.

Q. Where are you presently employed?

A. In the City of Dyersburg Public Works Department.

Q. Have you lived in Dyersburg since then?

A. Yes, sir.

Q. How long have you lived there?

A. All my life.

Q. Do you know Vivian Forsyth Archie?

A. Yes, sir, I do.

Q. How long have you known her?

A. Probaly ten, fifteen years.

Q. In what capacity, Mr. Green, have you known Vivian?

A. I used to go with her some.

Q. For how long a period of time did you date her?

A. Two or three years.

Q. How long ago was that?

A. It's been about six years ago.

[1253] Q. Have you known her socially before that and since that?

A. Yes, sir. I've been around her different places and stuff, yes, but not nothing close since we quit going together.

Q. Mr. Green, based upon your association with her over this seven year period, do you have an opinion about whether or not she is a truthful or untruthful person?

A. I wouldn't trust her as far as I could throw her. She's a compulsive liar and got a split personality. I wouldn't believe—

THE COURT: Sir, I think you've answered the question. Go on to your next, please, sir.

BY MR. EMMONS:

Q. Mr. Green, in addition to your opinion that you just stated, do you know what her reputation is among her other friends, neighbors and acquaintances for whether or not she's truthful or untruthful?

A. I ain't ever heard anything very good about her lately.

Q. As to truthfulness?

A. Yes, sir.

MR. EMMONS: Thanks, sir. Pass the witness.

THE COURT: Cross examination.

MS. SPAIN: Yes, sir.

\* \* \* \* \*

[Testimony of Ralph Lawson]

[1264] [Mr. Emmons:] Q. How long have you known Judge Lanier?

[Mr. Lawson:] A. Ever since I've been in Dyersburg, 1960. I went up there Halloween night, October 31, 1961. I've known him since then.

Q. Would it be fair to say that ya'll have been on both sides of some political controversies?

A. That's right.

Q. A political ally in the sense that you're always on the same side of that issue?

A. When I first went to Dyersburg, I went in with a firm. I didn't know anything about politics at the time, still don't know much, but I went with a firm that was not aligned with Judge Lanier's father. And so I was identified as "anti-Lanier" for a period of time, a number of years.

Q. Now, in subsequent time in recent years, have you worked on special assignments as a referee in Juvenile Court?

A. Yes, I have.

Q. What would prompt that kind of assignment?

A. Since Judge Lanier gained the bench, there were occasions when he would be out of town or what have you and he had asked me if I would fill in for him as Juvenile Referee and I was always glad to accommodate the Court.

Q. Did that occasion—was that sometimes occasioned by [1265] any possibility of conflict of interest or some appearance of impropriety?

A. Yes.

Q. Particularly, did you appear as referee in a case involving Vivian Archie Forsyth in a child custody matter?

A. I was appointed to take that case over. I was not advised why, I didn't ask. I was just asked, I believe, by the Clerk, advised me that the Chancellor wanted to know if I would hear that case, that he had some kind of conflict and I agreed to do it.

Q. And did you do that, hear that case?

A. Well, just a little bit of it. There never was a hearing, per se, with litigants in court, but I did take over the responsibility of handling that case, yes.

Q. Did you ever represent either a lady named Ruby Sipes or her husband or both of them?

A. Yes, I represented Terry Sipes, her husband, in an estate matter and Ruby was always there when we conferred and when we gained a settlement in Circuit Court. And later, I represented Mr. Sipes in a divorce action against Ruby Sipes.

Q. Did you have the matter before Judge Lanier that involved that estate matter or property matter that he ruled against you on and that you appealed it, or, am I correct in that?

A. Yes, you are.

[1266] Q. What was that about?

A. We run successful in trying to stop a foreclosure, SBA foreclosure, and they had their own attorney in from Nashville, and the Judge ruled against my client, Mr. Sipes. And so we elected to appeal it and took it through the appellate process.

Q. What was the result of that?

A. We were not successful on the appeal, my client lost his case.

Q. Was the Judge's ruling affirmed?

A. The Judge's opinion was affirmed, yes.

Q. Now, I believe you said that you represented Ruby Sipes' husband in a divorce action?

A. That's right.

Q. Was this a contested divorce, a hearing, or was it settled and disposed of on an agreed property settlement?

A. I recall that the defendant, Ms. Sipes, did not appear within the time limit to file an answer. We set the matter down on default. Mr. Sipes and I appeared in court before the Chancellor, gained the default and shortly after that, Mr. Lyman Ingram called me, if you want me to go on?

Q. Yes, sir.

A. Mr. Lyman Ingram, a local attorney, called me and said he'd just been retained by Ms. Sipes and they

wanted to petition to reopen the case. We opposed it but Chancellor [1267] Lanier allowed it to be reopened and, at that time, after further hearing, he confirmed our default in so far as the divorce being granted to my client. But he awarded what she had, Ms. Ruby Sipes, had asked for through Mr. Ingram, child support for the seventeen year old daughter. So we sort of won it and lost it.

Q. Okay. And Ruby sort of won it and lost it, is that what you're saying?

A. Yes.

Q. Do you handle a number of divorces, Mr. Lawson?

A. Quite a few, about twenty—

Q. Twenty, I'm sorry—

A. Excuse me.

Q. I'm sorry.

A. Probably about twenty percent of my practice is domestic relations.

Q. Where do you file for divorces in Dyer County, which court?

A. Well, you have a choice. When Judge Joe Riley came on the bench, our Circuit Judge, he made it very clear to the Dyer County Bar that he did not favor, did not want to hear divorce cases, being heavily involved in criminal practices. So, we tried, I tried, most of my domestic relation cases in Chancery Court, but the trend the last two or three years goes both ways. I file them in Circuit Court and I file them [1268] in Chancery Court.

Q. And who makes that decision where they are to be filed?

A. Usually it's up to the lawyer.

Q. Sometimes, does the client have a preference?

A. Yes, sometimes a client thinks that they have heard about a particular judge and they want to be in that court and, you know, usually it's for no other reason than just to accommodate the client. It usually doesn't make any difference which court you go into in a domestic relations case.

Q. If you get involved in a case where you file in a certain court and something arises that makes the client feel uncomfortable with the judge, is there a procedure for recusal of that judge and transfer to another court?

A. Yes, it is. It happens all the time. You file a motion and you present the issue to the court and I can't remember a case, I'm sure it's happened but it hasn't to me, where you ask the judge to recuse himself and they normally do.

Q. Normally they do?

A. Yes.

Q. Did you ever tell Ruby Sipes or her husband to go see Judge Lanier directly in chambers in regard to these matters that were before him?

A. No, sir, I wouldn't. If I had done that, then I shouldn't have a license to practice law. I would have never [1269] done that with any client.

Q. All right. That's something that should not have been done?

A. You don't do it.

Q. Do you have a recollection—you handle some criminal cases, too, a few, don't you?

A. Probably about ten percent of my practice is criminal.

Q. Do you have any recollection of being in the criminal courtroom on occasion when Judge Lanier was sitting in the courtroom that day, or do you remember anything about that or not?

A. I don't remember ever—I'm sure it's happened, but I know Judge Lanier didn't like to be involved in the criminal practice cases. He told me that and I don't remember that.

Q. Okay.

A. I may have been.

Q. Do you have any recollection, Mr. Lawson, of you and Lyman Ingram and Terry Sipes, your client, and Ruby Sipes, his client, meeting together, the four of you to try to work out that property matter?

A. I'm sure we had, yes. We always try to work it out, if we can, through counselling with agreement with clients. We talked about it. In fact, I'm the one, I think, that drew up the swapping of deeds between Terry Sipes and Ruby Sipes. And, if I'm not mistaken, she executed the deeds of transfer [1270] and then after all that was over, she changed her mind and she wanted more of the property, or something. I don't remember. It was something like, yes, we met at length and agreed on everything.

Q. And from any of those meetings, would you have ever had occasion to tell her, go over and talk to the Judge by yourself?

A. Mr. Emmons, I'm telling you now. In thirty years of practice, I have had clients that wanted to do that and I've told them they can't do it. You just don't do it.

MR. EMMONS: I pass the witness.

THE COURT: Cross examination, please.

MS. SPAIN: Yes, Your Honor.

\* \* \* \* \*

# **TRIAL TRANSCRIPT**

(December 11, 1992)

[1422] **DAVID W. LANIER,**

having first been duly sworn, was examined and testified as follows:

## **DIRECT EXAMINATION**

**BY MR. EMMONS:**

Q. Would you state your name, please, sir.

A. David W. Lanier.

Q. And where do you live, sir?

A. 219 South Main Street, Dyersburg, Tennessee.

Q. You a long time resident of Dyersburg, Tennessee?

A. Yes, sir, I was born in Dyer County and I've lived there except when I was off in college.

Q. And your present job or occupation, sir, is what?

A. I'm the Chancellor of the Twenty-ninth Judicial District.

Q. You are temporarily not setting until the resolution of this matter, is that correct?

A. That's correct.

Q. Judge Lanier, you mentioned that you were born in Dyer County. Did you live there most of your life or all of your life?

A. I've lived there all of my life except when I was in college.

Q. Where did you go to college?

A. When to Memphis State University for three years [1423] and then the University of Tennessee law school for three years.

Q. Receive a law degree?

A. Yes sir, received an LL.B. Degree in 1958.

Q. And are you licensed to practice law in the State of Tennessee?

A. Have been licensed since that time.

Q. When you got out of law school, where did you go?

A. Went back to Dyersburg and started private law practice.

Q. What was your first encounter in the political arena?

A. In 1959—well, I was—I went to Lackland Air Force base for about three months in 1959, too, in the Air National Guard, but in the 1959 when I came back and started by law practice, I ran for the position of delegate to the constitutional convention of 1959.

Q. Has it been your intention originally to get into politics when you went back to Dyersburg?

A. No, sir, I came back to practice law and felt that it was my purpose to do just that and not be involved in politics.

Q. You are from a very political family, is that correct?

A. That's correct. My grandfather was a political [1424] office holder. And my father was a political office holder. And my brother was a political office holder.

Q. Your father was clerk of the county for how many years?

A. He was the county clerk court clerk for 24 years and general session judge for eight years.

Q. Did he hold any other political positions?

A. No, sir.

Q. You've heard him described in this courtroom as the Ed Crump of Dyer County, do you have any comment on that, sir?

A. Well, not being from Shelby County, I don't understand actually what that means. But my father was a political leader, if that is what that means, and he was involved in politics for some 32 years.

There is a plaque in the Dyer County Courthouse with his picture on it stating that he was involved in politics for 32 years. And he dedicated his life to helping other people.

Q. Your brother James O. Lanier, died about how long ago?

A. He died in 1991, September 1st.

Q. And he, at the time of his death was holding what position, sir?

A. District attorney.

[1425] Q. How long had he been the district attorney?

A. One year.

Q. What was—what was the cause of his death?

A. Cancer.

Q. Did he actually have cancer when he was elected district attorney?

A. He had had several operations. He had a kidney removed that was cancerous. He had a lung removed that was cancerous.

After he became district attorney he had a brain tumor which ultimately caused his death.

Q. During the time that he was district attorney, was he in the office regularly or—

A. Yes, sir.

Q. —or not?

A. He was there everyday.

Q. Okay, sir, let's talk about your political history.

What was the first office that you hold after being a delegate to the constitutional convention?

A. I was elected alderman for the City of Dyersburg in 1964.

Q. When was that?

A. 1964.

Q. Oh, 1964. And how long was that term?

[1426] A. That was a two year term.

Q. And your next office?

A. I served as alderman from '64 to '65 and was elected mayor of Dyersburg for 1966—took office in 1966.

Q. How many terms did you serve as mayor?

A. Served seven terms, 14 years.

Q. You were defeated finally, I believe, for mayor, correct?

A. In 1980, yes, sir.

Q. When did you become chancery court judge, and how did that come about?

A. In 1982 I ran for position of law and equity judge at the time. It was a special judgeship that was created for Dyer County. And Judge Jones, who had been there for 48 years, retired. And five attorneys ran for that job and I got elected.

Q. And have you been in that position continuously since then?

A. Yes, sir, I've been re-elected in 1990 without opposition.

Q. Those are how many year terms?

A. Eight year terms.

Q. Judge, are you married?

A. I'm divorced at this point.

[1427] Q. And how long were you married to Joan?

A. I was married 29 years.

Q. And how many children from that marriage?

A. Two.

Q. Their names? Their names?

A. Leigh Ann—

Q. Take your time.

A. She is Leigh Ann Johnson—I'm sorry. And my younger is Robbye Lanier.

Q. Grandchildren?

A. Yes.

Q. One grandson, is that correct?

THE WITNESS: Could we take a break?

THE COURT: Let see you and the lawyers over here for a minute.

(The following proceedings had at side-bar bench.)

THE COURT: Judge, I don't mind taking a break. I don't think this is going to get any easier.

THE WITNESS: I can't talk when I'm emotional. I will have to sit there if that is all right.

THE COURT: I'm not going to pressure you and I don't want—

\* \* \* \* \*

[1429] THE COURT: Could we have the jury out, Marshal.

THE MARSHAL: Yes, sir.

(Jury present at 11:55 a.m.)

THE COURT: Are you ready to proceed?

THE WITNESS: I hope so.

MR. EMMONS: Yes, I'm sorry.

THE COURT: All right. Mr. Emmons.

MR. EMMONS: Thank you, Your Honor.

BY MR. EMMONS:

Q. Judge Lanier, what type of judge is a chancery judge?

What are your duties and responsibilities, at least in the Dyer County circuit?

A. My duties since I've been the law and equity court judge until now has been concurrent jurisdiction with the Circuit Court.

We—the court was changed from law and equity to Circuit Court in 1984 I believe it was.

Q. Change of law and equity to Circuit Court?

A. To Circuit Court.

Q. All right.

A. For a short period of time I was the Circuit Court Judge Part II in Dyer County and Lake County. And there was no chancellor in the district.

[1430] So, after that it was changed to Chancery Court and we have all chancery jurisdiction plus most Circuit Court jurisdiction except criminal cases.

And up until the Supreme Court ruled, I forget now, maybe a year or so ago, we tried all accident cases, tort cases, all kind of cases that Circuit Court tried.

Chancery Court ordinarily does not try that type of case. We try boundary disputes, probate matters, divorces, equitable type things where there's not a real legal issue. It's what's fair for the people, it is more than equity court was called.

Q. Can you hear worker's comp. settlements in your court?

A. Hear worker's comp. settlement, yes.

Q. Do you hear any type accident, automobile accidents, wreck injuries at all?

A. Yes, I heard many, many of those jury trials, things like this. With this recent ruling I'm back to hearing regular Chancery Court cases and no more of those jury trial automobile accident, tort cases.

Q. Would it be fair to say, Judge, that you handle most of the divorces in Dyer and Lake County?

A. Probably 80 to 90 percent of them, yes, sir.

Q. Would it be just as fair to say that you do not [1431] have all of them and, if not, what other courts have jurisdiction?

A. The Circuit Court has concurrent jurisdiction. That means that they can hear divorce cases just like Chancery Court can. And it's up to the lawyers and their clients to decide which court they file their divorce case in.

Q. If a divorce case is filed in your court, do you hear the child custody and support matters?

A. Ordinarily when a case is filed in my court I hear it to its end. Sometimes something comes up in between there at the beginning or the end of that I will interchange with Judge Riley, the Circuit Court judge.

Q. Is there a procedure for recusal of a judge and is that done?

A. Yes, sir. If—pardon me, if a client [or] a lawyer feels that they cannot get a fair trial in my court or Judge Riley's court, they can ask us and we will normally step down or they can file a motion for recusal asking us to

recuse ourselves and we will have a hearing on it and see what the reason is. And if we feel that it is a legitimate reason, we will step down.

Q. How long have you had Juvenile Court jurisdiction?

A. Since I was elected, 1982 in Dyer County. I have [1432] no juvenile jurisdiction in Lake County.

Q. And how much of your time is spent in juvenile matters roughly?

A. I usually spend about two court days a month and possible another day or two on other matters.

Q. As a part of that juvenile jurisdiction, do you have juvenile officers and employees, I mean, adult people but who are working in the adult section?

A. Yes, sir. We have a probation Juvenile Court officer, and a youth services Juvenile Court officer and a secretary in that office.

Q. Some of these people work in Juvenile Court were Juvenile Court officers or have they been in the passed?

A. When I first got elected judge, the two juvenile officers, Joey McDowell and Stan Caviness, were also deputy sheriffs or police investigators in addition to working for the Juvenile Court.

Since that time, in reading the law, Juvenile Court officers are not authorized to be law enforcement officers. They are two separate functions. And we have changed that procedure so that the Juvenile Court officers now are officers of the court that work with the juveniles to try to help rehabilitate them or get them to treatment if they [1433] need it and work with the Judge.

\* \* \* \* \*

[1442] [Q.] How many employees do you hire and/or fire?

A. Four.

Q. Four people?

A. Yes.

Q. And what positions do they hold?

A. My secretary in the courthouse and two juvenile officers and one secretary in the juvenile office.

Q. Did you ever fire any of these people that have testified against you here this week and last week?

A. No, sir, never fired any of those people.

Q. Sandy Sanders, where is she currently working to your knowledge?

A. She is still working right where she has been working ever since I hired her. Sandy, I think, made the statement that I fired her but I did not fire her.

Q. As far as your judgeship is concerned, what specific power do you have there that people seem to be afraid of?

A. My power is, as a judge, is to make decisions in case based on the law and the evidence as presented in court to me. That's the extent of my power.

Q. Do you talk to people in chambers?

A. In Dyer County I've been in politics a long time as you can tell from the offices that I've been elected to. Everybody knows me, they say I voted for [1443] you, I feel like I ought to be able to talk to you. I will talk to anybody that comes through the door. I will not discuss their case or the way that I'm thinking about their decision in their case. If they have got a case, I say, now, look, if you want me to hear your case, you can't talk to me about it. If you don't want me to hear your case, talk to me and I will recuse myself. So I talk to people everyday, lawyers and regular citizens, anybody that wants to talk.

Q. Did you have an open door policy in your office?

A. I have an open door policy.

Q. A lot of time answer your own phone?

A. A lot of time answer my own phone.

Q. Generally make yourself accessible to the public?

A. Up until this started I was in the office everyday from about eight o'clock to five o'clock. Since this has

started, I started holding court and leaving the court after I got through with court.

\* \* \* \* \*

[1447] Q. Do you recall when that was approximately?

A. About a year before I hired her, but I don't remember even when I hired her now.

Q. You have heard the allegation that she has made regarding events of misconduct on your part that took place May through August of 1989, have you not?

A. Yes, sir, I've heard about that.

Q. Are those claims true or false?

A. They are false.

Q. Let me go back to why you hired her.

What was there about her that made you hire her?

A. She came in and, of course, she really wanted a job. She said I've been to college, got 90 something hours in criminal justice, it's what I went to college for to get in the legal field.

Q. Is that an important criteria in hiring a juvenile officer?

A. It's not a determining criteria but it does mean whether or not we get a federal grant. If one of the officers does not have 96 hours in criminal justice, then we cannot get a federal grant. We have two officers, one of them can have it, one of them cannot have it, or they can both have it or can have a college degree in criminal justice and satisfy the requirement, but if none of them have it, that just [1448] means that we can't get that federal grant.

\* \* \* \* \*

Q. Did you hire Ms. Sanders?

A. I finally hired Ms. Sanders about a year later or several months later.

Q. She has testified that you required her to make weekly visits to your chambers, is that correct?

A. I have standard operating procedures for the juvenile officers. And there's a whole two pages of them.

One of the requirements in those two pages is that they have to fill out a weekly activity report and bring it to my office and discuss it with me, what's been going on for the past week over in the juvenile office, like I say, a couple of blocks away from where [1449] I am.

Q. And the reason that they have to come over is because one reason is that their office is separate from yours?

A. Right, it is not in the courthouse. I don't ever see them during the week. And I asked them to come over, I am the juvenile judge, I need to know what is going on in the juvenile office. And the only firsthand way I can know is for them to come over and go over each day's activities and talk to me about what is going on in the juvenile office. And I do ask all of them to do that. They don't do it though.

Q. She has also charged, Judge, that sometime during that time that you pinned her into that chair and kissed her right on the lips, you heard her make that charge, did you not?

A. I heard her say something like that, and that is absolutely false.

Q. Have you ever to your recollection kissed her at all?

A. Yes, sir, I have kissed her. She has hugged me and kissed me from the first day that she came in there for her first interview.

She came in there with a little short skirt on and she came up and hugged me and kissed me—well, she [1450] didn't kiss me then, she has hugged me though every time.

And I didn't hire her because I didn't—I didn't—I didn't think that I needed to hire her right then. But she kept coming back and I finally hired her.

And she hugs me or did hug me everyday when she came over there, which was not a weekly basis but every time she came in she hugged me and I hugged her and that was just our way of greeting each other.

Q. She said you kissed her on the lips, did you ever do that?

A. I never kissed her on the lips.

Q. Where did you kiss her?

A. It seems like on the cheek or something like that.

Q. Did she ever reach a point where she let you know that she didn't want to you do that?

A. Yes, sir, she did.

Q. Tell us about that?

A. She had been not so religious up—for a long period. And then she became a religious person and she came in and told me, she said, I've—I have started going to church. I'm a very religious person now. I feel strongly in my religious beliefs. And it makes me uncomfortable to hug you or kiss you or whatever, you know, touch. And I said, I'm sorry if [1451] I've offended you, I want to apologize and it will never happen again. It has never happened again.

Q. Do you recollect something your ex-wife, Joan, testified to a meeting with juvenile officers at the Peabody Hotel in Memphis sometime after that?

A. Yes, sir.

Q. And what is your recollection of what happened with you and Sandy Sanders?

A. We went in there and they were over on one side of the room. We came in another door on the other side of the room. And she saw me and she came over there and gave me a hug, which, you know, that was not in the office, that was not in the courthouse, and that was a different situation.

And another time we were at the Dyer County Fair, I was there with my daughter, Leigh Ann, and she came up and hugged me. But that—it has not happened any more in the courthouse.

Q. Did the fact that she had hugged you prior to this and on these occasions and you had hugged her have

anything to do with you being the judge or any power that you may have had over her in your mind?

A. None whatsoever. I'm a hugging type person. Women hug me in front of my wife and it upsets her. And I hug women. They hug me. And it just is a [1452] natural thing, it just happens, seems like in Dyer County maybe more than other places, I don't know.

Q. What about Mrs. Sanders' job performance from the time she was hired, was it satisfactory or unsatisfactory?

A. Mrs. Sanders had a hard time learning how to do the job.

She would do something one day and I would correct her about it. I'm the type [of] person that doesn't say anything as long as you are doing it right. If you don't do it right, I let you know about it. I don't lose my temper or anything. I don't have a temper to speak of but I let you know about it.

She would do something, I would say you've been told not to do that, you've been told to do it this way.

She would say, oh, I forgot or I didn't understand it that way. It won't happen again. Well, then in another month it—probably the same thing would happen again. It's been that way constantly and I've told her about it. I've continuously told her about her performance and her position.

Q. Did you ever take away any supervisory powers from her, you had previously given her, in retaliation against her?

[1453] A. No, sir. I tried to give her supervisory powers when she came. When I hired her the first time, I said, look, you have the criminal justice requirements, the college credits. Rob Hammond's working over there, he has a high school education, he does not have the criminal justice requirements. You will be in charge of the office. You will be over him. You will make the decisions. You will tell me what's going on.

She said, I don't know whether I can handle that or not. I said, well, try it and if you can't handled it let me know.

She never assumed the responsibility. She would not be a supervisor. She would not be a boss. She did not want to tell anyone what to do. She wanted to get along with everybody and just go along without any controversy.

Rob Hammond quit after some period of time, I don't remember how long after she was there. And I hired Lisa Golden. Lisa caught on quicker than Sandy, and she kind of took over the operation of the juvenile office and Sandy said, well, you are just listening to Lisa all the time. I said, well, Lisa knows what she is talking about. People came to me and said Lisa is doing a good job, we want to [1454] recommend Lisa to you. Nobody ever came to me and said Sandy is doing a good job, we want to recommend Sandy to you.

So Lisa quit and I hired Edward Barr. He was a black guy, and Sandy didn't like that because I hired him and I didn't put him over her, but I put him on the same level with her, and that's when this controversy about me taking her supervisory powers away from her came up because I put him equal to her.

Q. She said she was just a small, in her direct testimony, just a small town girl and she didn't think anyone would believe her over the judge, did you hear her say that?

A. Yes, sir, I heard her say that.

Q. What's your response to that?

A. Well, I—I think that there were enough people in Dyer County who were after me that would have listened to anybody, and all she had to do was to complain to Jim Horner, he was the district attorney at the time and had run against my brother and beat him twice before that time, and I don't think that she would have had any problem, or Stan Caviness, who was a city police-

man worked with her regularly, he worked for juvenile with the city police department.

Joey McDowell would have been—been glad to talk [1455] to her about it, he was the city investigator. She had a lot of people that would believe that I had done something to her if she had tired—tried at the time.

Q. Did a controversy arise over sick leave, Judge?

A. Yes, sir.

Q. What was the nature of that?

A. The county had never had a sick leave policy until a couple of years ago or three years ago. And they drew up a handbook, when Don Deals got elected county executive, he decided he want to have a handbook for the county.

So included in that handbook was a sick leave policy. He said, well, we have never had one before so people who have worked here five years or whatever should be given some benefit of the sick leave time that haven't been able to accumulate up to this point.

So the county commissioners included in that handbook, I think it was 30 days accumulated sick leave up to that point, and they said that everybody that has been there for certain periods of time automatically has this amount of sick leave to begin with.

So, Sandy and Tina Brock, who was the secretary in the juvenile office, came to my office together and [said we've got 30 days sick leave \* \* \* we want to start taking it a day or two a month just as a day off.]

\* \* \* \* \*

[1460] A. I think you asked it and I didn't respond. I think that is when we took the—

Q. (Interjecting) Okay. Would you go ahead and tell us what you can about that, please?

A. Yes, sir. It is a County car furnished by one of these federal grants. And the County furnishing the gasoline. It is to be used for official business only. That has been told to each of them.

On a few occasions it was reported to me that she was using it for her personal business. I contacted her about this and she admitted that she was using it for her personal business. She had been going to the grocery store, going to a tanning salon to get her sun tan. And one Saturday I went to the city park and she was out there at the city park at a children's birthday party in the County car.

Q. Did others have access to that particular car?

A. At that point we had two County cars and she drove one and the other officer drove the other one. Nobody else had access to it.

Q. Did this cause any controversy between you regarding your relationship with this woman?

A. Yes, sir. She didn't like me telling her not to use the car. It upset her.

\* \* \* \* \*

[1463] A. And I told her that somebody had to be in the office in case of an emergency situation or to handle the day to day business. I think maybe the grand jury was in session or I had been indicted, one. I think the grand jury was in session.

So, she called somebody down here in the U.S. Attorney's office. And I think they called you and said that I was mistreating her, wouldn't let her go to a conference that she wanted to go to.

Q. Was that the fact at all?

A. No, sir, it was not the fact at all. She could go to a conference any time during the year when we had two employees there. But I didn't feel that she could go then because we didn't have anybody there to run the office if she went.

Q. You heard her testify that she had to get her credits by listening to tapes. Do you know if that is correct?

A. I don't know whether she even got her credits or not. But I knew she could get her credits some other

way. There are a lot of ways to get credits. And she told them, so you told me, that if she didn't get to go to that conference then she would lose her commission, that she would not be accredited for that year.

Q. During all of this problem with Ms. Sanders, even after you found out she was testifying against you in the [1464] grand jury, did you ever retaliate against her in anyway?

A. No, sir, I did not.

Q. Did you ever seek retribution in any way?

A. No, sir, I did not.

Q. Did you ever fire her?

A. No, sir.

Q. Is she still working there?

A. She is still there.

Q. Judge, is there anything else about Sandy Sanders that I have neglected to ask you about that you think you ought to testify about?

A. One other item was the DUI school that she and Rob Hammond set up. When I find a juvenile guilty of DUI, I order him to go to a DUI school. There were two or three different places that provided that service. I think it maybe cost them thirty dollars, or something like that. So, she and Rob Hammond got together and said, "Well, we can do the DUI school, we can make that thirty dollars ourselves." And they set that up so they could make some money on the side.

Q. Did you have any objection to that or was there any controversy engendered because of that?

A. Well, it wasn't working out and I told them that it wasn't going to work out. But they continued to do it until they decided to quit.

[1465] Q. Now, Judge, do you know Sandy Attaway?

A. Yes, sir.

Q. And what is your recollection of the first time that you ever met Sandy Attaway?

A. I don't really remember where I first met Sandy. It was probably at my house one Saturday when she came swimming over there with my daughter.

Q. Was that something that she did more than once?

A. Yes, sir, she did that several times.

Q. And do you know whether or not your daughter's husband Larry and Sandy Attaway's husband had been friends over the years?

A. I knew they were associated with one another. They went hunting together, but I don't know how good a friends they were.

Q. How did the name Sandy Attaway come to the attention to you as a possible candidate for the secretarial position?

A. I was at my daughter's house and my son-in-law's house and my grandson, little David's house, and she called and was telling Leigh Ann that she needed a job and would she put in a good word with her—for her with me. I just happened to be sitting there and Leigh Ann said that is who it was and that is what it was about.

Q. What did Leigh Ann tell you about her?

A. She said that she needed a job and she thought I [1466] ought to hire her but she really didn't know whether she was qualified or not.

\* \* \* \* \*

[1467] A. Because of my daughter. She recommended her.

Q. You wanted to give her a chance?

A. Give her a chance, see if she could do the job. Each time I hired someone, it was for a six month probationary period.

Q. Was that standard procedure in your office?

A. That is standard procedure.

Q. You heard Sandy Attaway mention that you began to do things sexually to her. You touched her and hugged

her and did things that she didn't want you to do. You've heard all of that testimony haven't you?

A. Yes, sir.

Q. Judge, is that true or false?

A. It is false.

Q. Did you hear her statements about what she calls suggestive statements that you made to her?

A. Yes, sir.

Q. For instance, I believe she testified that she answered the phone one day and there was—or somebody came in to see you, some man. And she told you on the intercom there is a gentleman here who wants to see you. And you replied there is a gentleman back here that wants to see you. Do you recall that?

A. Yes, sir, I recall her saying that. I don't recall doing that, but I could have. I could have been waiting on [1468] her to bring me a file or come back there for any reason. I don't remember that particularly.

Q. You heard her say that in regard to the Amway plan that she didn't really want to do it. And you loaned her the money and said you don't even have to pay me back, that you all could work it out. Is that true or false?

A. Well, I don't think she said I loaned her the money. I think she said that I offered to loan her the money. And I did. She was really in a financial bind. Her husband had quit his job. He was working second shift. And she told me that he was jealous of her. She had a friend that she talked to a lot and he said he just couldn't work. And would call home between his breaks and at supper time and he was worried about her all of the time. So, he quit his job. And she was telling me all of these things and said she needed some help financially. So, I said, "Well, my wife is in this network marketing program and it looks like a good thing, you ought to look into that." She said, "Well, I don't have the money." I think it cost a hundred and nine dollars. And about sixty dollars of that was for products and about forty-nine dollars for the fee to get in

it. And she said, "I don't have the hundred and nine dollars." And I said, "Well, don't worry about that, if you want in it, if you think it is a good deal, I'll let you borrow the money and you can pay me back."

[1469] Q. Was there anything in your mind but just an offer to try to help her?

A. That's all that was.

Q. She testified that on one occasion you hit her on the rear end.

A. I have never hit her on the rear end. I have never grabbed any of her private parts.

Q. By the way, that reminds me. There was one thing I meant to ask you about with Sandy Sanders. Did you hear her testify that you grabbed her and sexually molested her as she was in the courtroom, coming out of the courtroom. What is your recollection of what she said?

A. My recollection is that after we finished juvenile court one day, she said she was going out the double doors going out of the courtroom and I walked up behind her and grabbed her buttocks. And that is absolutely not true. And she said the DA was standing there. Some lawyers were standing there and some other—Stan Caviness and Mark Grant, the City Juvenile Officers were standing there. And that is absolutely not true. I have never grabbed that girl on any private part.

Q. Back to Sandy Attaway. She testified that she was trying to get some time off and you told her, "If I give you half a day off, what are going to do for me." Do you recall any statement like that?

[1470] A. No, sir. I don't ever recall making a statement like that.

Q. Did she ever talk to you about her personal problems?

A. Sandy Attaway?

Q. Yes, sir.

A. Yes, sir. Like I told you, she talked to me a lot about her personal problems.

Q. What about her job performance, how would you evaluate her as her employer?

A. She tried to do her job. She worked hard at it, but she had a hard time doing it. The big thing was setting the cases properly. That is probably the—well, answering the telephone and setting cases are probably the primary things that have to be done in that job and she had a hard time doing that.

Q. Who did she have to deal with in setting cases?

A. Lawyers. She talked to all of the lawyers in the County and surrounding counties, setting their cases and trying to schedule them where one case wouldn't run into the next case. Where they wouldn't overlap.

Q. Is that for the convenience of the court as well as the lawyers?

A. It was really more for the convenience of the lawyers and the litigants than it was for the court. Since then we have started having court all—come in at 9:30 on Fridays [1471] and that way the lawyers are not [in]-convenienced so much and the clients are not either, but we get through with them a lot quicker that way.

Q. In addition to scheduling problems, did she have any problem answering the telephone?

A. Yes, sir, she did.

Q. Like what?

A. She just couldn't handle telephone conversation like I thought she should handle it. She got things confused and mixed up when she was trying to talk on the phone.

Q. Did she have personal visitors come to the office?

A. Quite often. She had some young guys that came in there and one in particular that sat there for an hour or so at a time and would detract her from her duties sitting there talking to him.

Q. There has been some talk about the way she dressed. Would you address that for the jury?

A. I think that is the ultimate thing that caused her to quit and walk out. We had a conversation one morning, I think it was on a Friday, that she set a bunch of cases when I had already sat a case that was supposed to take an hour. She sat a bunch more cases on top of that one. When I walked in the courtroom to hear that one case, there were about ten other lawyers and their clients sitting there waiting to go to court. And I knew I was going to be an [1472] hour on that case. So, it was really kind of confusing at that point.

\* \* \* \* \*

[1473] When it first came up, I went to my daughter, Leigh Ann, who worked upstairs in the Clerk and Masters Office. And I said, "Now, look, you asked me to hire her. I hired her." I am asking you now to talk to her about the clothes she is wearing." So she said she would. They—I understand two or three of them upstairs had mentioned to her that she should wear different type clothes to be the secretary down there. So, when I told her that, she blew up. I said, "Things are just not working out right, and we are just going to have to make some changes." She walked out, went into her office and got her keys and brought them back to me and just handed them to me. And I said, "What are you doing?" She said, "I'm leaving." And this was about nine o'clock on Monday morning. And I said, "Well, don't you want to stay until you can try to find you another job?" She said, "There is no point in it, I am leaving." And she left. And I think her husband had a job that depended on the weather and she didn't have a job at all after that.

Q. Did you fire her?

A. No, sir. I never even mentioned changing jobs.

Q. What was your intention?

A. My intention was to try to get her to do better.

[1474] Q. And if she couldn't?

A. If she couldn't, ultimately she would have been asked to leave.

Q. Did you take any retribution against her for that at all?

A. No, sir. No, sir. On the contrary, she came back in a few days and said she needed to draw unemployment because she didn't have any money, would I sign an unemployment slip saying that I laid her off. And I said, "Well, I didn't lay you off." I said, "You quit voluntarily." She said, "Well, I can't draw unemployment if I quit voluntarily." I said, "Well, you draw it up and I'll sign it." So, I signed it.

Q. Did you ever give her a letter of recommendation of any kind? Did she ever ask for that?

A. I don't believe she ever asked for it. I think she came back later and asked me—excuse me—to go upstairs with her and talk to the DA's Office to see if I could help her get a job up there. She had understood there was a vacancy up there.

So, I walked up there with her and Billy Hall was standing in the office when we walked in the door.

Q. Who is Billy Hall?

A. He was the investigator for the DA's Office at that time. And I told him—

Q. (Interjecting) Let me ask you this. This would have [1475] been—I believe the indictment alleges February through May 1991. Was this during the brief period of time when your brother was the District Attorney?

A. He took office September 1st, 1990 and he was the DA until September 1st, 1991.

Q. But was it during that period?

A. Sometime during that year, he was physically incapacitated and he appointed Joe Boyd as Acting District Attorney. I don't know which period this was.

Q. You went to Billy Hall and what inquiry was made of Billy Hall?

A. I told him that she was looking for a job. I understood that they had an opening in the DA's Office. Of course, I told her on the way up there. I said, "I want

you to know that I don't have any influence in the DA's Office." She said, "Well, just go with me anyway." So I went.

And I walked in and Billy Hall said, after I told him what we were doing, he said, "I think that has already been filled, I don't think we have a vacancy up here." So, I left and left her standing there.

Q. Did she ever call you back on the phone about a power of attorney? And if so, would you tell us about that?

A. Yes, sir. She called me two or three times after that, came and visited with me two or three times after [1476] that. But on this one occasion she called me and said—well, while she was working for me she had told me that she was living in her father's house. And he didn't live there, he was off in some other county or town somewhere. And he came back and she had to move out and had to rent her a house while she was working for me. So then after she quit work and was gone for a few days, she called me and said that her father was going to leave town again and he wanted to give her a power of attorney so that she could do what she needed to do with the house and he was going to let her move back into the house. And I said, "Okay." She said, "Can you do it for me?" I said, "No, I can't do it for you, I cannot practice law but there are some forms here in the courthouse that I can show you and you can type up your own power of attorney." And she said, "Okay, I'll be over there." I think she had gotten a job at First Citizen's by then. She said, "I'll be over there on my day off and type this up." I said, "That's fine, just let me know and I will have the form for you."

Q. Judge, is there anything else about Sandy Attaway that you want to tell this jury about that I have overlooked?

A. I can't remember anything else.

Q. Let's talk about Vivian Archie. You know Vivian Archie, of course?

[1477] A. Yes, sir, I know Vivian Archie.

Q. Do you recall how long you have known her or under what circumstances you met her?

A. I have known who she was probably all of her life. She lived in the same neighborhood that I lived in and she was probably born when they lived on a farm in Western Dyer County. And they moved to town and built a house within two or three blocks of where I lived.

Q. Do you know her mother and father?

A. Yes, sir. I am not real close friends with them but I know them.

Q. Lived in the same neighborhood?

A. Yes, sir.

Q. Did Vivian Archie come to you on one occasion asking for a job?

A. Yes, sir, she did.

Q. Do you recall about when that would have been?

A. It seems like it was about September or October of 1990?

Q. The indictment alleges about October—one count September of '90, one count October of '90. Does that sound about right?

A. That's about right.

Q. And tell us the nature of that conversation, Judge?

A. She came to my office. Well, she came from the [1478] juvenile office. I think she had been over there with her friends. And she came from the juvenile office to my office and had an application. And said she wanted to put in her application for a job.

Q. What job did she want?

A. My secretary's job.

Q. You said she had been to the juvenile office. Did she know someone who was working over there?

A. Yes, sir. She and Lisa Golden were best friends.

Q. And had they sent her over to apply for this?

A. They told me that they had sent her over there.

Q. So, did she have an application already, you mean?

A. She had an application when I first saw her. The first time I saw her, she had an application.

Q. And what was the nature of your conversation that first time?

A. I told her that I didn't have a job available, that it had already been filled. She said, "Well, I am a good worker." Said, "I grew up on the farm, I've driven tractors, combines, done manual labor, I can do anything and I need a job." She said, "I have been staying with my parents and my father and I have gotten into a physical fight and I had to leave there because I didn't want to have to fight with him." "He had a stroke and I didn't want to have to fight with him, so I left and moved into a house [1479] behind Dr. Doug Haynes' house." I believe he took her in. And she said, "I'm desperate, I have a young daughter and I'll do anything for a job, no questions asked, nobody will ever know it but you and me." If she said that one time, she said it five time.

And I said, "Well, I don't have a job, I've already filled my job." She said, "But I've got to have some help." I said, "Well, I'll keep my eyes open and if I see anything that is available, I'll let you know."

Q. You said she mentioned having problems with her father. Did you bring up at any time during that conversation something about her child?

A. Yes, it seems like when she mentioned having a fight with her father, I said, "Well, he came by here the other day and wanted to know what to do to file papers to get custody. And I told him the first step would be to get him a lawyer." And she said, "Well, we are fighting and I don't want him to have custody."

Q. Why did you bring that up? What was the purpose of your saying that?

A. Just because he had been by there, no ulterior motive, no reason except that she told me that she was fighting with him and I told her, "Well, he is talking about taking custody of your child, so you need to be aware of that."

[1480] Q. Did you talk to her father about the details of the case?

A. No, sir, I did not. I just told him that he needed to get him a lawyer. He wanted to know how to do it. He didn't ask me. He didn't talk to me about any details or even whether I would do it or not. He just told—he was walking into the courthouse and I was coming out of my office and he didn't even come into my office.

Q. Do you have a standard procedure in dealing with people when they ask you about a case?

A. Yes, sir, I surely do.

Q. What is that standard procedure?

A. If they have a case in my court, I tell them that if they want to talk to me about it, then I'll recuse myself from that case, but if they want me to hear the case, they better not talk to me about it. They better let their lawyers do the talking in court.

Q. Do you recommend anybody to get a lawyer if they don't have one?

A. I tell them all when they come to me and talk about filing some sort of case, that I can't do anything about it, they will have to get a lawyer before I can even hear the case.

Q. Was that the extent of your conversation with Vivian Archie about what her father had been by your office and [1481] complained?

A. That was the extent. And he wasn't coming to my office, he was just coming in the courthouse and I was coming out the door and ran into him.

Q. So he didn't come in your office at all?

A. No, sir.

Q. Did you say that to alarm her?

A. No, sir, I surely didn't.

Q. Did you say it to try to show what kind of power you had over her?

A. I didn't even think about it being any power. I didn't think that there was even a case involved that

would concern me or her either one. I thought that was a family problem, that they were fighting between themselves.

Q. We'll come back in just a moment to where we were, but as a matter of fact, later it did develop into a custody battle, did it not?

A. Yes, sir, it did.

Q. And what position did you take in regard to that?

A. Well, what happened was that her mother was keeping her child every day while she was out trying to get her a job, or whatever, and she took the child and brought the child to Memphis.

Q. The mother did?

A. Her mother did.

[1482] Q. Vivian's mother?

A. Judy Forsythe. And by the way, Judy Forsythe had applied for a job with me too and I didn't hire her either. But she came to Memphis with the child and wouldn't let Vivian know where she was. So, Vivian got all excited about that. She wanted to see her child. She hired Charles Kelly, I believe, to represent her and she had a warrant issued for her mother's arrest for kidnapping. And they came to Memphis because Judy filed a petition in Juvenile court in Memphis to give her custody of Vivian's child.

They had a hearing on it. A. V. McDowell was the juvenile court referee and he said this is a case that needs to be held in Dyer County because all of the parties live in Dyer County. He referred that case to Dyer County juvenile court. By then this was on up in November sometime. Vivian and I had been to Nassau with Dr. Warner. Vivian had been coming up to my apartment building where Dr. Warner rented a room on a regular basis. We had become friends. And when they sent it back to Dyer County, I told Ralph Lawson to hear it because I wasn't going to get involved in it.

Ralph Lawson was in charge of it. I think he testified he didn't really have to have a hearing on it and Vivian finally just dropped everything.

Q. All right, sir. You stepped out of it?

A. Right. I got out of it completely. She had a [1483] divorce too. I think she testified it was in my court sometime before that. It was an uncontested divorce. And when all of this came about, I entered an order of interchange in that divorce case November the 15th, 1992. I believe you have the file on that with that order in it where I would hear nothing else concerning Vivian Archie at all.

Q. Back to her initial visit to you in our office applying for the job. You heard her testify that when you mentioned her father and talked to you that that made her very fearful that you were going to take the child away?

A. I heard her testify to that but she never even commented about that when we were in my office.

Q. You heard her testify as a result of that, you made sexual advances on her and forced her into a compromising position and made her do oral sex upon you. You heard that, didn't you?

A. I heard that too. That is totally untrue.

Q. You heard some other testimony that suggested that she told Dr. Warner that though she never said that you forced her to do anything, that you had had a sexual relationship with her. Is that testimony true or false?

A. That is untrue too. I believe she said that she told him that I asked and she complied, I believe was his words and that is untrue.

Q. I am not asking you whether or not she told Dr. [1484] Warner that, that she might have done that, but whether or not that there was a voluntary sexual relationship?

A. No, sir, that was not true either. And I heard about that later and I confronted her with it one day.

And I said, "I have been hearing that you have been saying things, telling Dr. Warner things." And she said, "Well, I will tell him different." She said, "That was not true and I will tell him that it was not true."

She came back later and said, "I told him, everything is straightened out, so there is no problem." Now, this was after the second incident.

Q. Passing on to something else, after she said, of course, she left your office after that incident, you heard her testify that she cleaned herself up in your bathroom?

A. Yes, sir.

Q. And that you offered her money. Is any of this true?

A. No, sir.

Q. Did you in fact talk to Dr. Warner about it at some point later?

A. Yes, sir. We went to Nassau together.

Q. This is a trip that just you and Dr. Warner had made?

A. Yes. And he was telling me that he needed a secretary, or receptionist, or somebody, to work for him, did I know anybody. And after Vivian had come in there and told me what she told me, I had told two or three people [1485] what she had done, how she had said it, how many times she had said it, and all of that.

Q. Why did you tell them that?

A. Because really it was a shock. It was frightening, really, for her to come in there and say, "I'm desperate, I'll do anything, no questions asked, nobody will ever know but you and me," just over, and over, and over. And so I told some people that. And they said, "Well, you don't know her reputation, do you?" Of course, they told me what her reputation was.

Q. Well, let me ask you about this first trip to Nassau and then we ought to clear that up. Why were you and Warner going to Nassau?

A. He owned a box company down there, a cardboard box company in Nassau. And he was having lots of problems with it. They were wanting some more money in it. He wanted to know if I wanted to go down and be an investor with him in it. So, I said, "Well, I will go look at it and see what you have got." And I went and I—

Q. (Interjecting) Just you and Dr. Warner?

A. No, there was another man along.

Q. All right. Three men had gone.

A. And I told him I wasn't interested. They wanted seventy-five thousand dollars more to keep it going. And I think he already had about six or seven hundred thousand [1486] dollars in it. And I said, "The best thing for you to do is just to put your seventy-five thousand in a CD somewhere and not put any more money in that box company." And he finally agreed to that.

But on that trip, he was asking me about somebody to work for him. I told him what I had heard about Vivian and what she had told me. He said, "Well, maybe I need to talk to her." I said, "Well, maybe you should, it is up to you." So, he said, "Would you call her and set up an interview with me." I said, "Yeah, I sure will," and I did.

Q. What did you tell her when you called?

A. I told her—I asked her if she was still—well, I didn't really talk to her then. She came by and I told her if she was still looking for a job, I had her an interview. And if she wanted the job, she could go talk to Dr. Warner.

Q. You heard her testify in this courtroom that a second time, then, you forced her into the same kind of oral sexual activity?

A. Yes, sir, I heard that.

Q. Is that true or false?

A. That's false.

Q. Then did you then hear whether or not she had taken this job with Dr. Warner?

A. Yes, sir. She left my office. And she testified she got there about 12:15 and stayed there about fifteen minutes [1487] and left my office and went to Dr. Warner's at 12:30. And he interviewed her and hired her that day and let her stay on with him the rest of the afternoon to learn what the job was all about.

And then she had a friend that she was going to babysit for the next day and then she was going to come to work the day after that on a regular basis.

Q. She called you and told you that?

A. He did, she didn't.

Q. Shortly thereafter, did you go out and meet them for lunch at a Mexican restaurant?

A. Well, Dr. Warner and I got to be pretty good friends after we went to Nassau that first time. And we met for lunch quite often and Vivian would come in her car a lot of times and have lunch with us.

Let me go back to Dr. Warner.

Q. Yes, sir.

A. When she left my office at 12:30 and went to his office and was interviewed for the job, she was actually going to her family doctor's office. He had testified that he was her family doctor that had operated on her and treated her since she was a young child. And she went into his office as a doctor, made no complaints, said nothing.

\* \* \* \* \*

[1490] Q. Was there anything sexual that went on between you [1491] two at all?

A. Nothing sexual whatsoever. One time I remember I was with her in the coffee shop and he was gone somewhere out maybe to—

Q. (Interjecting) She mentioned that she saw you on the beach one day.

A. Yeah, I went—well, he was there too. He was walking up the beach and we were separated and I went down where she was and then he walked up about ten minutes later.

Q. Did she appear to be apprehensive about anything at all about you being there alone with her?

A. No. She was very friendly and talkative and we discussed every kind of thing in the world. That is what I was fixing to tell you. One night, I remember, we were in the coffee shop and she was telling me that Dr. Warner had wanted to buy her a bracelet and a ring. And she just didn't want to take his money, she just didn't want to take advantage of him. And then she was asking me what to do about that. I said, "Well, if he wants to buy it for you, let him buy it for you. I mean, he wouldn't offer unless he wanted to." He came back to the table in about five minutes and she said, "Let's go." She was gone maybe ten minutes and came back with a bracelet and ring on. So, we discussed things on a friendly basis, there wasn't any apprehension, there wasn't any fright to the trip.

\* \* \* \* \*

[1493] Q. Regular court orders, cases Mr. Kelly had there?

A. Yes, sir.

Q. And other lawyers in his firm?

A. Yes, sir.

Q. Did she come into your chambers to have those signed?

A. Yes, sir. She came into my secretary's office and she came into my chambers office.

Q. Did she show any fear or any apprehension at all?

A. Never a bit.

Q. Did she ever get angry at you because you didn't hire her for the job that she went to the interview on?

A. I think what she got angry at me about was because I wouldn't hear her case.

Q. Are you talking about child custody case?

A. Yes, sir. She might have gotten angry about the job too, but she got hired shortly thereafter, so I don't think she would have. She might have stayed mad about that, but—

Q. (Interjecting) The child custody case, though, would have been after you all had been friendly with—

A. (Interjecting) After we had been to Nassau and everything else before that ever came up.

Q. And you said you still refused to hear her case?

A. Right. And I told her and I told Dr. Warner both on that trip. I said, "Now, any legal matters that you all have, I will not be able to hear them because of our [1494] association." \* \* \*

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[1499] Q. How did you come to meet Patty Mahoney?

A. I probably met her several years ago when she was working in Bubba Agee's law office.

Q. Working in whose law office?

A. Bubba Agee.

Q. Is that a lawyer in Dyersburg?

[1500] A. Yes, sir.

Q. A friend of yours?

A. Yes, sir.

Q. Someone you have known a number of years?

A. Yes, sir.

Q. And what was she doing for Bubba Agee, do you know?

A. I think she was a secretary for him.

Q. Did she at some point—I believe the indictment alleges in Count 5 matters occurring in September and October 1990. Did she at some point apply for a job as your secretary?

A. Yes, sir, she did.

Q. And did you interview her?

A. I did.

Q. And you hired her?

A. I did.

Q. Was there anything particular about her that—her qualifications that caused you to hire her or her recommendation? Anybody recommend her to you?

A. I don't recall anybody recommending her to me. She was an attractive person, had a good personality and dressed properly and appeared to be the type person that would do a good job in the judge's secretary's position.

Q. Did she have a good personality, you say?

A. Yes, sir.

[1501] Q. Did she seem to want the job?

A. She definitely wanted the job.

Q. Did she give you an indication as to whether she needed the job badly?

A. Well, I don't think she gave me an indication that she needed it badly. She told me that she was receiving a thousand dollars a month child support for her children from her husband who lived in Kentucky and she just wanted a job.

Q. And how long did she work for you in total?

A. She testified about three weeks and I couldn't argue with that.

Q. Okay. What was the problem?

A. She was not qualified to be a secretary. She had real difficulty doing what she was supposed to do. Of course, when she came in, like all of the rest of them I got her to type a letter. She could type. I told her each of her duties. I went to her. We sat down, we talked about them. We went over her duties and that is my customary way of doing things. So, I said, "Go to it, the other girls around here will help you. If you have any questions ask them."

She started working and the next day I came in and I had to tell her the same things over again that I had told her the day before. She didn't do those things. She didn't remember what I had told her. The third day she came in, I [1502] told her the same things over. \* \* \*

\* \* \* \* \*

[1504] I don't mind telling anybody two or three times what I expect, but when it just keeps going over and over, I tend to get a little bit upset about it.

Q. Did you ever, as a result of that, call her in and tell her it wasn't working out?

A. No, I don't think I ever told her that. I think that she gathered that from me letting her know how I felt about things a time or two. But I don't believe I ever even said things are not working out you are going to have to start looking for another job, or anything like that. I think she told me, "I just cannot stand the pressure, it is too much pressure on me." She said, "I have just been through a traumatic divorce and my nerves have just been shattered all to pieces and I am just not able to take the pressure."

Q. She liked the job, I take it, except for the pressure?

A. I think she did like the job.

Q. She testified, I believe, that she liked being with the lawyers and things like that?

A. Right.

Q. Did you fire her then from that job?

A. No, sir, she quit.

Q. Do you know if she got another job following that?

A. I am not sure whether she did or not.

Q. Did she ever contact you or call you at the office or [1505] at home after she quit the job with you?

A. Yes, sir, she contacted me and called me both at the office and at home. We talked on the phone quite a lot after she left.

Q. What was the nature of these conversations?

A. We just talked about everything. We—like she said, I am a good listener and I just sat there and listened to her talk. And she told me about all of her love life, her people that she wanted to go with, people that she didn't want around her but kept coming around here.

She told me about her ex-husband coming to town and her putting a tape recorder where she could—

THE COURT: Excuse me a second, Judge. I have already ruled on that particular question.

THE WITNESS: All right.

BY MR. EMMONS:

Q. I am not asking for specifics. Did she once—well, I will make my question more narrow specifically. Did she once tell you about a man she was going with who she referred to as being a quote, "cock handler"?

A. Yes, sir. She talked to me about that. Called his name, said she wasn't going to date him because that is what she called him.

Q. And some of these conversations were after she had quit the job?

[1506] A. They were all after she quit the job, those conversations were.

Q. Did you have any complaints about the way that she got along with the lawyers personally?

A. No, sir, she got along. She is a very personable type woman and she looked good and seemed to get along with everybody good.

Q. She has testified, and you heard her, in this courtroom that you continually sexually touched her. You have heard that testimony, have you not?

A. Yes, sir, I have heard that.

Q. Judge, is that true or false?

A. That is false.

Q. As a matter of fact, I believe there is one point in her testimony, she characterized it as being a touch a day?

A. Yes, sir, I heard that. We hugged and we talked and did all of that every day. But I have never touched that girl sexually at any time. Never grabbed her breasts or buttocks or any other private part of her.

Q. Did you first—is this the lady that you first met over at Bubba Agee's apartment?

A. No, sir. She worked at Bubba Agee's law office.

Q. Okay. That is Fonda Bandy you met over there?

A. Fonda Bandy is who I met over there.

\* \* \* \* \*

## TRIAL TRANSCRIPT

[December 14, 1992]

[1544] THE COURT: All right lawyers, are we ready to proceed?

MR. EMMONS: Your Honor, I have a couple of matters, sort of house keeping matters. Number one, I'd like to remind the Court we have a motion for a mistrial still pending to be ruled on. And I do have some special requests that I can give the Court at the first recess. Number three, we have prepared transcripts of this other Lisa Couch tape that has not been played, the one in the Chancellor's—and we are going to ask that that be allowed to be played to the jury along with this transcript of it. The government needs to look at this transcript copy to be sure it is not anything we need to talk about.

THE COURT: Have you given them a copy?

MR. EMMONS: I'm doing that right now, Your Honor. I think they had a copy before. Well, I'm sure they have. Would the Court like a copy?

THE COURT: Yes, sir.

(Whereupon, a copy of the above described transcript was passed to the Court.)

THE COURT: Have the two sides met to discuss the accuracy of the transcripts?

MR. PARKER: No, sir.

THE COURT: Has the government prepared its own [1545] transcript?

MR. PARKER: No, sir.

THE COURT: Does the government have objections to the use of the transcript?

MR. PARKER: Yes, sir. We haven't had time to review the tape. As the Court may know, we got to looking for the tape before trial and somehow it had been given back. We had marked it as an exhibit in a hearing and somehow given it back to the defendant and we

didn't have the tape before trial. And at this point, we were under the impression that they wanted to use the transcript, so we haven't had time to go back and go over the transcript with the tape in detail.

THE COURT: Who has the tape? Do you have the tape?

MR. EMMONS: No, sir. That's the question we'll all—it was introduced into evidence at that bond hearing and the clerk of the court somehow apparently told the government that we had taken it back. I have actually no recollection of that and I don't think I could have done it had I wanted to, once it had been put into evidence. We have a copy that we kept. It is a true and accurate copy and prepared the transcript from it. We can testify to that. The government heard the original copy of the tape that day in Judge Breen's court and we had this transcript then that [1546] Judge Breen used and they made no objection to the transcript at that time. They have their copies of that tape since that time. The original, as far as I know, has been misplaced.

MR. PARKER: But we have not had a copy of that tape since that detention hearing. We only got a copy of the tape the first part of this trial. That is why we were concerned, we were out trying to get the exhibit and get it copied, and stuff like that. The clerk's office says it went back to Mr. Emmons, or the defendant, or somebody, and they don't have custody of it. And so we haven't had a copy to work off of and prepare a transcript from for us to compare. With all of the problems going on with tapes in this case, and we got such short notice, we would object to the transcript being introduced. The jury can hear the tape. We have no way to—

THE COURT: (Interjecting) Is the tape clear?

MR. EMMONS: Not nearly as clear as the last one, Your Honor. That is one of the problems. It is more like one of those government undercover tapes that the government does this on all of the time, where they submit

transcripts and the court instructs the jury that they don't have to take the transcript as the evidence, with the tape just as their assistance. We are just asking the same thing here.

THE COURT: But I also don't ever do unless both sides have had a chance to compare the transcript to the tape [1547] and be heard on whether it is accurate or not.

MR. EMMONS: Yes, sir. I believe they are saying that in addition to the fact that they had a transcript three or four months ago, they have had another copy made. They have had a copy of the tape since before this trial started.

THE COURT: Well, I hear that, Mr. Emmons, but the fact that they have had doesn't mean they know you are going to use it. They are entitled to have a chance to compare to the tape.

MR. EMMONS: Certainly.

THE COURT: And it might have helped if somebody had mentioned it Friday so that it could have been done over the weekend, as I suspect a lot of other things were done.

MR. EMMONS: Yes. Well, it should have been mentioned Friday.

THE COURT: When are you planning on getting to it?

MR. EMMONS: Well, it is time for it right now, Your Honor. We can wait until—

THE COURT: (Interjecting) Wait until when?

MR. EMMONS: Sequentially we are talking about Lisa Couch. We are through with her—with Judge Lanier's direct testimony with regard to Lisa Couch once this tape is played.

THE COURT: Well, is she the next one up?

[1548] MR. EMMONS: We just finished her, Your Honor. We were in the process of finishing her. I had announced to the Court—

THE COURT: (Interjecting) Oh, yeah. Yeah. I really do wish you had said something about this Friday. How long does the tape last?

MR. EMMONS: Very short.

THE COURT: Well, you all play it and compare it. Let's find out if the transcript is any good or not, and let's do it in a hurry, otherwise I am going to keep it out.

MR. EMMONS: Yes, sir.

MR. PARKER: Part of the problem is, Your Honor, you know it takes a while to compare these. Like I said, we had an expert examine the last one to find a fault in it.

THE COURT: Well, I heard what you are saying, but he is entitled to put on his evidence too and all I'm talking about now is whether the transcript can be used.

(Playing tape)

THE COURT: I need to listen to it again. Go ahead.

(Playing tape)

MR. PARKER: Your Honor, we object to the transcript. First, the first two lines, I don't know about Mr. Moskowitz and Ms. Spain, I can't understand if that is what they say. I believe it is totally inaudible and I can't [1549] understand those are the words.

Secondly, on the second page, after the sixth statement. In other words, between Lisa and "DWL" there is conversation that is omitted from the transcript. Judge Lanier said something about, "You mean you told them no." And she says, "Well, that's what I told them." None of that is here in the transcript and so the transcript is not accurate.

MR. EMMONS: I agree, we just noticed that ourselves. We agree this sentence is left out of the transcript.

THE COURT: Well, I don't see how we can send an inaccurate transcript back there. I think you are entitled to play the tape.

MR. EMMONS: We'll just have to play the tape. We played the other tape. Both tapes are very clear, espe-

cially the first one we played in this machine. They are very clear.

THE COURT: All right. Are we ready for the jury?

MR. EMMONS: Yes, we are ready, Your Honor.

THE COURT: Marshal, will you ask the jury to come out?

(Whereupon, the jury was brought into the courtroom, and the trial of the case continued in the hearing and presence of the jury, as follows:)

[1550] THE COURT: Good morning, ladies and gentlemen. Thank you all for being here on time. Mr. Lanier, would you come around and retake the stand, please.

DAVID W. LANIER,

The said witness, after having been previously sworn, resumed the witness stand and continued testifying, as follows:

MR. EMMONS: Judge, I will remind you that you are still under the oath that you took last week.

THE WITNESS: Yes, sir.

THE COURT: Mr. Emmons?

MR. EMMONS: Yes, sir.

[1551] DIRECT EXAMINATION

BY MR. EMMONS:

Q. Judge, I believe as we concluded Friday you were finishing up your testimony with regard to the witness, Lisa Couch. Is that your recollection?

A. Yes, sir, I believe so.

Q. I want to go back to one other thing. You have heard testimony regarding the meeting that you had with Lisa Couch and her parents with regard to a voluntary change in custody after the indictments had been returned in this matter.

A. Yes, sir.

Q. And you also testified that after that meeting, Lisa Couch asked to see you privately in your office, is that correct?

A. That's correct.

Q. And you heard Ms. Criswell testify about that too?

A. Yes, sir.

Q. And you heard Lisa Couch testify about that?

A. Yes, sir.

Q. Is that testimony correct, did she ask for such a meeting?

A. She asked for it.

Q. And did you go back into your private office with you?

A. Yes, sir.

Q. Leave the door, as has been testified?

[1552] A. Yes, sir.

Q. Cracked. And did you have a conversation back there?

A. We did.

Q. And you heard, of course, some of the statements Ms. Couch said she made to you back there in response to my cross examination, as she testified, did you not?

A. Yes, sir.

Q. I'll ask you if you did in fact tape record that conversation for your own protection? Or did you tape record the conversation?

A. I did tape record the conversation.

Q. And have you brought with you today an accurate copy of that tape and have you listened to it to make sure that it accurately reflects the conversation you had in your chambers that day?

A. Yes, sir.

Q. Would you like to have that played to the jury at this time?

A. Yes, sir.

MR. EMMONS: If the Court please, I would ask that that tape be played to the jury at this time.

(Playing tape)

MR. EMMONS: If The Court Please, I would ask, since it is such a short tape, ask that the jury be allowed to hear that one more time.

[1553] THE WITNESS: I think if you would control the volume a little bit, you could hear it a lot better. That has been my experience.

MR. EMMONS: Could we let the volume down a little bit.

THE WITNESS: In places it gets so loud you can't hear what she is saying. When I listened to it, that is what I had to do, control the volume.

MR. EMMONS: I would ask that the witness be allowed to control the volume.

THE COURT: Yes, sir. Step down and do it. Is the tape rewind?

MR. PARKER: Yes, sir.

THE COURT: Thank you.

(Tape played again)

(Witness resuming seat at witness stand.)

BY MR. EMMONS:

Q. Judge, you heard the testimony of Ms. Couch during the time you went back in her office and you were taping her, that you were again fondling her. Did you hear that?

A. I heard that.

Q. Is that true or false?

A. That is false.

Q. Is there anything I have left out in regard to Ms. Couch's testimony that you need to tell this jury?

[1554] A. Well, of course, I think you can tell from that tape whether or not there was anything going on outside the conversation. The U.S. Attorney and the FBI questioned her shortly after this in Dyersburg, and I think

we had this at another hearing. And they stated that the only thing that she told them about this conversation at that questioning was that she came back into my private office to thank me for doing the consent order for the custody of her child. She did not mention anything about a conversation like this to them within a few days after this happened. To me that indicates that they were—that she was afraid of them not me.

Q. Judge, do you know a lady named Fonda Bandy?

A. Yes, sir.

Q. You have heard her testimony in this courtroom?

A. Yes, sir.

Q. How long have you known Fonda Bandy and what is your recollection of how you met her?

A. I met Fonda Bandy at Bubba Agee's apartment at the Post House. I don't remember exactly when, but I was visiting at his apartment and she was there, and I met her there. She had been decorating his apartment, and she had been going with Bubba Agee. She was still married at the time they were going together, and that is where I met her.

Q. Bubba Agee is a lawyer in Dyersburg, a friend of yours?

[1555] A. Right.

Q. Do you know whether or not he is the one that recommended her for the—I believe he recommended someone else for a job in your office one time, maybe not.

A. I don't know whether he talked to her about this job or not.

Q. Fonda Bandy never applied for a job with you, did she?

A. No, sir.

Q. She said she came to see you in regard to a parenting class that was part of her responsibilities at the Dyersburg Housing, Drug Free Housing Project. Is that the way you recall it?

A. She called me one day and said she would like to talk to me about whatever she does, and I didn't know what she did at the time, and I'm still not sure what she does. But she did call and ask for an appointment and she came to see me one day.

Q. When she got there, did she talk about this parenting class?

A. She did, it was very briefly. She gave me her business card and I think she said she worked through the Dyersburg Housing Authority on some federal grant program where she got paid through a federal grant. But I don't even remember her going into any details about a parenting program or what she does [1556] down there, or anything else. I think that she mentioned that if I had any people through court that would need a parenting skills program, that they could provide that for them. And I had just had one a few days before, and I mentioned that. I told her I would get the attorneys to contact her about it. And I didn't realize until she testified that only people that were residents of the Dyersburg Housing Authority were eligible for her program. So, I really didn't have anybody that was eligible for her program going through my courts.

Q. Did you have any objection to the parenting class, strong feelings for or against it?

A. Well, I was all for it. I think that it is something that is needed. There are a lot of young married couples that need some parenting skills taught to them, and I was all for it, and told her if I could send anybody to her, I would be glad to.

Q. Do you recall getting any more communication from her in regard to that program?

A. No, sir, I don't believe I ever heard from her again about that.

Q. What did she want to talk about when she was in your office, what was your recollection of it?

A. Well, when she came in and gave me her card and sat down, we started talking. And she had been divorced, I [1557] believe. \* \* \*

\* \* \* \* \*

[1558] Q. How long do you think it took?

A. Fifteen to twenty minutes.

Q. When she was through talking to Mr. Agee, what happened then?

A. When she got through, she said, "Well, thank you. I want to —" You know, she was leaving. And I got up to show her to the door and she came over and hugged me and kissed me when she got ready to leave. And thanked me for calling Bubba, that she really had been wanting to talk to him and she really appreciated me doing that for her.

Q. She seemed to especially happy about that?

A. She just seemed really excited.

Q. Did she say anything to you about Joe Boyd of the District Attorney's office sending her down there to talk about this parenting class?

A. No, sir, she never mentioned Joe Boyd.

Q. When did you find out it was only limited to the people in the Dyersburg Housing Authority?

A. When she testified down here in this trial court.

Q. Do you recall having any further conversations with her about the parenting class?

A. I think I called her office one day and left a message that there were some people that needed a parenting skills program, but I didn't talk to her, so I don't think I have ever talked to her again since then.

\* \* \* \* \*

[1572] [Mr. Moskowitz:] Q. And you again, in 1990, solemnly swore that you would uphold the laws of the State of the Tennessee and of the Constitution of the United States, isn't that correct?

[Mr. Lanier:] A. Yes, sir.

Q. And that you wouldn't violate those laws, you would uphold them. You would enforce them fairly. You won't use them for a bad purpose, isn't that correct?

A. That's correct.

Q. And I'm sure you would agree, Judge, that it would be a violation of your oath and it would be just plain wrong to take advantage of your power and your position as a judge to assault people who are under your authority and control. Wouldn't you agree with that statement?

A. I would agree if I assaulted anybody, it would be a violation of the law.

Q. All right. Well, I know that you deny the assaults, but I think we need to establish that you would agree that that would be wrong if it had happened.

A. Yes, sir.

\* \* \* \* \*

# TRIAL TRANSCRIPT

(December 16, 1992)

\* \* \* \* \*

[1861] \* \* \* Ladies and [1862] gentlemen, a reasonable doubt is a real doubt based on reason and common sense after careful and impartial consideration of all the evidence in the case. Proof beyond a reasonable doubt, therefore, is proof to such a convincing character that you would be willing to rely upon and act on it without hesitation in the most important decisions in your own life. If you are convinced that the defendant has been proved guilty beyond a reasonable doubt, say so by returning a verdict of guilty. If you are not convinced to that extent, then say so by returning a verdict of not guilty.

As stated earlier, you must make your decision only on the evidence that was admitted in this case. The term evidence includes the testimony of the witnesses, the exhibits admitted in the record and any facts of which the Court has taken judicial notice. Remember, that anything that the lawyers have said in questions, objections, statements or argument is not evidence in this case. It is your own recollection and interpretation of the evidence that controls. Some of you have heard the terms "direct evidence" and "circumstantial evidence". Direct evidence is the testimony of one who has searched actual knowledge of a fact, such as an eye witness. Circumstantial evidence, on the other hand, is proof of a chain of facts and circumstances indicating or indirectly proving that the defendant is either guilty or not guilty. It is your job to decide how much [1863] weight to give to either type of evidence. The law makes no distinction between the weight that you may give to either direct or circumstantial evidence.

You should consider all the evidence, both direct and circumstantial, and give it whatever weight that you believe it deserves. You should use your common sense in weighing the evidence. Consider it in the light of your

everyday experience with people and events and give it whatever weight you believe it deserves. If your experience tells you that certain evidence reasonably leads to a conclusion, you are free to reach that conclusion.

You should not assume from anything that I may have said or done during the course of this trial that I have any opinion concerning any of the factual issues in this case. Except for my instructions to you, you should disregard anything that I may have said in arriving at your own decision concerning the facts. You are instructed, ladies and gentlemen, that the Court has taken judicial notice of the fact that Dyersburg, Tennessee is located in the Western District of Tennessee. This is merely a shorthand method of receiving evidence on a matter I consider to be so well established that we don't need to hear a witness on that point. Since you are the fact finders in this case, you may but are not required to accept this fact as conclusively established.

[1864] In saying, ladies and gentlemen, that you must consider all the evidence, I do not mean to say that you must accept all the evidence as true or accurate. You should decide whether you believe what each witness had to say and how important that testimony was. In making that decision, you may believe or disbelieve any witness in whole or in part.

The number of witnesses concerning or testifying concerning any particular dispute is not controlling, of course. You may decide that the testimony of a smaller number of witnesses concerning any fact and dispute is more believable than the testimony of a larger number of witnesses to the contrary.

In deciding whether you believe or do not believe any witness, let me suggest that you ask yourself a few questions. Did that person impress you as one who is telling the truth? Did he or she have any particular reason not to tell the truth? Did he or she have a personal interest in the outcome of the case or some bias or prejudice or

reason for testifying that might cause that witness not to tell the truth or to slant his or her testimony? Did the witness seem to have a good memory? Did the witness have the opportunity and the ability to observe accurately the things that he or she testified about? Did that witness appear to understand the questions clearly and to answer those questions [1865] directly? Did the witness's testimony differ from the testimony of other witnesses? You should ask yourself whether there was evidence tending to prove that the witness testified falsely concerning some important fact or whether there was evidence at some other time the witness said or did something or failed to say or do something that was different from the testimony that he or she gave during the course of this trial. Keep in mind, of course, that a simple mistake by a witness does not necessarily mean that that witness was not telling the truth as he or she remembers it. People do naturally tend to forget some things and to remember other things inaccurately. So if a witness has made a misstatement, you need to consider whether that misstatement was simply an innocent lapse of memory or an intentional falsehood. That may depend upon whether it had to do with an important fact or only with an unimportant detail.

Since the defendant did testify, you should decide in the same way as that with any other witness whether you believe the testimony of the defendant. When knowledge of a technical subject matter might be helpful to the jury, a person having special training or experience in that technical field, one would call them an expert witness, is permitted to state his or her opinion concerning those technical matters. Merely because an expert witness has expressed an opinion, however, does not mean that you must [1866] accept that opinion. The same as with any other witness, it is up to you to decide whether to rely upon it.

During the course of this trial, you heard evidence that at times other than the times charged in the various

counts of the indictment in this case, the defendant committed acts similar to the acts charged in the indictment. You may consider such evidence not to prove that the defendant did the acts charged in this case but only to prove the defendant's state of mind. That is, that the defendant acted as charged in this case with the necessary intent. You've also heard evidence with respect to the various acts charged in the different counts in the indictment. To the extent that the acts charged in one count are similar to the acts charged in the other count, you may consider such similar acts only to prove the defendant's state of mind but not to prove that the defendant did the acts charged in the other counts. Therefore, if you find first that the government has proved beyond a reasonable doubt that the defendant did, in fact, commit an act charged in any count of the indictment and secondly, that the defendant also committed similar acts at other times, then you may consider those similar acts in deciding whether the defendant committed the act charged in that count willfully and not due to accident or mistake.

\* \* \* \* \*

[1873] The indictment in each of these counts, ladies and gentlemen, charges the defendant with having violated a statute of the United States, Section 242, of Title 18 of the United States Code. That statute reads, in pertinent part, "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any state, territory or district to the deprivation of any rights, privileges or immunities secured or protected by the constitution or laws of the United States, shall be guilty of a crime against the United States." This law was passed by [1874] Congress many years ago in order to carry into effect certain provisions of the Constitution of the United States. The Federal Statutory Provision which I just read in part was designed to insure that no person in the United States would be deprived of

his or her liberty without due process of law by officials acting under color of any law, statute, ordinance, regulation, or custom. It is a protection against encroachment by the state or federal governments and their authorized officials and agents upon the rights of any person under the constitution and laws of the United States. In other words, Congress intended to provide that no agency of government, no official or agent by whom its power is asserted or carried into execution, should willfully deprive any person of rights guaranteed by the constitution and laws of the United States through the use of such governmental powers.

In order to sustain its burden of proof for the crime of willful[] deprivation of a constitutional right under color of law, the government must prove the following four elements beyond a reasonable doubt. First, the person upon whom the alleged acts were committed must have been an inhabitant of the State of Tennessee. Second, the defendant must have been acting under color of law. Third, the conduct of the defendant must have deprived the victim named in each count of a right secured or protected by the constitution or [1875] laws of the United States. And fourth, it must have been an intent on the part of the defendant willfully to subject the victim to the deprivation of the rights described above.

With regard to the first element of the offense, I instruct you that if you find that the victim named in each count was present in the State of Tennessee at the time of the incident charged in the indictment, then she was an inhabitant of the state within the meaning of this statute.

With regard to the second element, the phrase "under color of law" means the real or purported use of authority provided by law. A person acts under color of law when that person acts in his official capacity or claims to act in his official capacity. Acts committed under color of law of the state include not only the actions of officials

within the limits of their lawful authority but also the actions of state officials who exceed the limits of their lawful authority while purporting or claiming to act in performance of their official duties. Misuse of power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law is an action taken under color of law or under color of state law. The phrase "under color of law", therefore, includes all acts both lawful and unlawful done under the real purported or claimed authority of any state law.

The third element, ladies and gentlemen, to be [1876] proved is that the conduct of the defendant must have deprived the victim of her rights secured or protected by the constitution or laws of the United States. Each count in this indictment charges the defendant deprived the victim named in that count of her right not to be deprived of liberty without due process of law, specifically her right to be free from willful sexual assault. The Fourteenth Amendment to the Constitution guarantees that no person can be deprived of liberty by the government without due process of law. Included in the liberty protected by the Fourteenth Amendment is the concept of personal bodily integrity and the right to be free of unauthorized and unlawful physical abuse by state intrusion. Thus, this protected right of liberty provides that no person shall be subject to physical or bodily abuse without lawful justification by a state official acting or claiming to act under the color of the laws of any state of the United States when that official's conduct is so demeaning and harmful under all the circumstances as to shock one's consci[ence.] Freedom from such physical abuse includes the right to be free from certain sexually motivated physical assaults and coerced sexual battery. It is not, however, every unjustified touching or grabbing by a state official that constitutes a violation of a person's constitutional rights. The physical abuse must be of a serious substantial nature that involves physical force,

mental [1877] coercion, bodily injury or emotional damage which is shocking to one's consci[ence.]

In making this determination, you should consider the nature and the duration of the alleged abuse, the reason or motivation for any physical contact, the context in which the alleged events occurred, intimidation or force, the extent of any injuries and the effect of the defendant's alle[ ]ged action.

For the physical contact to be unlawful, it must have been unauthorized and not due to the free and voluntary consent of the alleged victim. It is for you to determine whether any such conduct occurred by reason of uncoerced and voluntary consent.

With regard to the fourth element, willfulness, I instruct you that an act is done willfully if it is done voluntarily and intentionally and with the specific intent to do something the law forbids; that is, with bad purpose, to disobey or disregard the law. In the case of the law involved here, it means with specific intent to deprive the victims of liberty without due process of law. With regard to specific intent, you are instructed that intent is a state of mind and can be proved by circumstantial evidence. Indeed, it can rarely be established by any other means. In determ[in]ing whether this element of specific intent was present, you may consider all of the intended circumstances [878] of the case.

I charge you that you may infer that a person ordinarily intends all the natural and probable consequences of an act knowingly done. In other words, you may, in this case, infer and find that the defendant intended all the consequences that a person standing in like circumstances and possessing like knowledge should have expected to result in his or her act or acts knowingly done. It is not necessary to show or prove that the defendant was thinking in constitutional terms at the time of the incident. You may find that the defendant acted with reckless and specific intent, even if you find that he had

no real familiarity with the constitution or with the particular constitutional right involved, provided that you find that the defendant willfully and knowingly did the act which deprived the victims of their constitutional rights. If you find that the defendant knew what he was doing and that he intended to do what he did and if you find that what he did constituted a deprivation of a constitutional right, then you may conclude that the defendant acted with the specific intent to deprive the victims of that constitutional right.

Counts 6, 7, and 10 charge that the defendant's acts resulted in bodily injury to the persons named in those counts. You are instructed that bodily injury means any injury, no matter how temporary. Bodily injury also includes [1879] physical pain as well as any burn, cut, abrasion, bruise, disfigurement, illness or impairment of a bodily function.

It is also not necessary that the defendant intended to cause physical injury to the victims. The government need only prove that acts of the defendant resulted in bodily injury to the victim. With respect to each of these counts, 6, 7 and 10, you must determine that the government has proved beyond a reasonable doubt that bodily injury resulted from the acts charged against the defendant in that count. I have included a specific question as to these counts in the verdict forms which I will explain to you in a moment.

You will note that the indictment charges that the offenses were committed on or about a certain date or in or about certain months. The government does not have to prove with certainty the exact date of the alleged offenses. It is sufficient that the government proves beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged.

Ladies and gentlemen, a separate crime or offense is charged in each count of the indictment. The number of counts is not evidence of guilt. And this should not influence your decision in any way. Each charge and the

evidence pertaining to that charge should be considered separately. The fact that you may find the defendant guilty [1880] or not guilty as to one of the offenses charged not affect your verdict as to any other offense charged. Let me caution you that as to each charge, you must determine from the evidence in this case whether the defendant is guilty or not guilty. The defendant is only on trial for the specific offenses alle[.]ged in the indictment under 18 United States Code, Section 242. This case, therefore, does not involve state charges of sexual assault and battery.

A question of punishment should not be considered by the jury in any way in deciding the case. If the defendant is convicted, the matter of punishment is for the judge to determine. You are here to determine the guilt or innocence of the defendant from the evidence in this case. You are not called upon to return a verdict as to the guilt or innocence of any other person or persons. You must determine whether the evidence in this case convinces you beyond a reasonable doubt of the guilt of the accused without regard to any belief that you may have about the guilt or innocence of any other person or persons.

\* \* \* \* \*

[1884] THE COURT: That completes the charge. Are there any objections, deletions, modifications?

MR. MOSKOWITZ: No.

MR. EMMONS: None.

(Whereupon, counsel returned to the counsel table, and the following occurred in the hearing and presence of the jury, as follows:)

\* \* \* \* \*

SUPREME COURT OF THE UNITED STATES

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No. 95-1717

UNITED STATES, PETITIONER

v.

DAVID W. LANIER

---

**ORDER ALLOWING CERTIORARI**

Filed June 17, 1996

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The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted.

June 17, 1996

(1)  
No. 95-1717

Supreme Court, U.S.  
FILED

AUG 16 1996

CLERK

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**In the Supreme Court of the United States**

OCTOBER TERM, 1995

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UNITED STATES OF AMERICA, PETITIONER

*v.*

DAVID W. LANIER

---

ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

---

**BRIEF FOR THE UNITED STATES**

---

WALTER DELLINGER  
*Acting Solicitor General*

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## QUESTIONS PRESENTED

1. Whether, under *Screws v. United States*, 325 U.S. 91 (1945), a defendant may be convicted under 18 U.S.C. 242 for the willful violation of a right secured by the Due Process Clause of the Fourteenth Amendment only if this Court has previously held that the right applies in factually similar circumstances.

2. Whether, for purposes of 18 U.S.C. 242, the right secured by the Due Process Clause of the Fourteenth Amendment to be free from a wholly unjustified interference with bodily integrity by a sexual assault by a state official acting under color of law has been "made specific," within the meaning of *Screws v. United States*, 325 U.S. 91 (1945).

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**In the Supreme Court of the United States**

OCTOBER TERM, 1995

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No. 95-1717

UNITED STATES OF AMERICA, PETITIONER

*v.*

DAVID W. LANIER

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*ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT*

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**BRIEF FOR THE UNITED STATES**

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**OPINIONS BELOW**

The panel opinion of the court of appeals (Pet. App. 87a-143a) is reported at 33 F.2d 639. The order of the court of appeals vacating the panel opinion and granting rehearing en banc (Pet. App. 165a-166a) is reported at 43 F.2d 1033. The en banc opinion of the court of appeals (Pet. App. 1a-86a) is reported at 73 F.3d 1380. The order of the district court denying respondent's motion to dismiss the indictment (Pet. App. 144a-156a) is unreported.

**JURISDICTION**

The judgment of the en banc court of appeals was entered on January 23, 1996. The petition for a writ of

certiorari was filed on April 22, 1996, and was granted on June 17, 1996 (J.A. 190). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

#### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Section 1 of the Fourteenth Amendment to the United States Constitution provides, in pertinent part, that "[n]o State shall \* \* \* deprive any person of life, liberty, or property, without due process of law."

2. Section 242 of Title 18, United States Code, provides in pertinent part as follows:

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State \* \* \* to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States \* \* \* shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section[,] \* \* \* shall be fined under this title or imprisoned not more than ten years, or both[.]<sup>1</sup>

#### STATEMENT

After a jury trial in the United States District Court for the Western District of Tennessee, respondent was convicted on seven counts (two felony counts and five misdemeanor counts) of willfully

<sup>1</sup> When respondent was indicted in this case, prior to the 1994 amendments to Section 242, the statute referred to "any inhabitant of" any State, rather than "any person in" any State. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320201(b), 108 Stat. 2113.

depriving a person of rights and privileges protected and secured by the Constitution and laws of the United States, in violation of 18 U.S.C. 242. He was acquitted on four counts charging violations of Section 242. He was sentenced to a ten-year term of imprisonment on each felony count and a one-year term of imprisonment on each misdemeanor count, to be served consecutively, for a total of 25 years' imprisonment, all to be followed by two years' supervised release. He was also fined \$25,000. The court of appeals, on rehearing en banc, reversed all the convictions.

1. Between 1989 and 1991, while he was an elected Chancery Court judge for Dyer and Lake Counties, Tennessee, respondent raped or sexually assaulted five women in his chambers, during the working day. In each instance, the victim was in respondent's chambers in connection with her employment in the court system, the prospect of such employment, or other official business. One of the victims also had a child custody matter before respondent. Respondent was the only chancellor and juvenile court judge in Dyer and Lake counties. Pet. App. 89a. He is a member of a politically prominent family in the area; his grandfather and father were political office holders and, at the time of most of the sexual assaults, his brother was the local district attorney. *Id.* at 34a, 63a; J.A. 134-135. Respondent served for two years as alderman and for 14 years as mayor of Dyersburg, Tennessee, before he was elected judge in 1982. J.A. 135-136. He was re-elected in 1990, and continued to serve in that capacity until he was removed pending the resolution of this case. J.A. 136; Pet. App. 57a.

As Chancery Court Judge, respondent heard divorce cases, probate matters, and boundary disputes.

Although the Circuit Court has concurrent jurisdiction over divorce cases, respondent handled most of such cases in the two counties, including related child custody and support matters. Respondent also had Juvenile Court jurisdiction. He had the power to hire and fire four court employees—his secretary, two juvenile officers, and a secretary in the juvenile office. J.A. 138-140.

2. a. The two felony counts on which respondent was convicted involve incidents of forcible oral rape of Vivian Archie, a childhood friend of respondent's daughter. In 1989, respondent presided over Archie's divorce, and awarded her custody of her daughter, Ashley. In the following year, when Archie was out of work and living with her parents, she learned that a job was available at the courthouse and applied for it. J.A. 47. Respondent interviewed Archie in his chambers. During the meeting, respondent told Archie that her father had recently been to see him, and had told him that he "wanted the judge to take custody away from [her] of \* \* \* Ashley." J.A. 49. Archie became afraid that she was going to lose custody of her daughter, and asked respondent if he was going to take her daughter away from her. Respondent told her that he could not discuss the case. *Ibid.* He then told Archie that he had already promised the courthouse job to someone else. Archie responded that she "would really do anything for a job" so that she could support and keep custody of her daughter. J.A. 50.

When Archie was preparing to leave, she reached across the desk to shake respondent's hand. Respondent grabbed her hand, pulled her around the end of the desk, grabbed her hair and neck, and tried to fondle and kiss her. Although Archie tried to push him away, respondent threw her into a chair and

continued to try to kiss her. He then stood over her, exposed himself, pulled her head down, and squeezed her jaws to make her open her mouth. He then forced his penis in her mouth and repeatedly thrust his penis into her mouth until he ejaculated. Pet. App. 94a-95a. Archie did not report the assault to anyone, including her family, because she was afraid that respondent would take custody of her child away from her. She was afraid no one would believe her, since respondent "had all of this power. He could do anything he wanted to do." J.A. 51. She also believed that, since "[h]e was the judge, \* \* \* [n]obody would listen and [she] would look like a fool." J.A. 52. Archie did not report the incident to the county prosecutor because he was respondent's brother. *Ibid.*

A few weeks later, respondent telephoned Archie's home and left a message that he had a job for her, but that she would have to come to his chambers to get the information. At her mother's insistence, Archie called back. Although Archie repeatedly asked respondent to give her the location of the job interview over the telephone, he insisted that she return to his chambers for the information. Archie went back to respondent's chambers, fearing that, if she did not, her parents would be angry that she was not trying to get a job, respondent would conclude that she had told her parents about the assault, and he would retaliate by taking her daughter away. J.A. 54-55.

While Archie was in respondent's chambers, he told her about a possible secretarial position available with a friend. As they were talking, respondent walked around his desk towards her. Archie began backing out toward the door, but he came up to her, slammed the door shut, and started trying to kiss her. She told him to stop and tried to push him away, but

he pulled her hair and pushed her into a chair. Respondent then exposed himself, and again forced her to open her mouth and perform oral sex, and ejaculated in her mouth. During the assault, Archie was crying, gagging, choking, and having trouble breathing. Pet. App. 63-64a.

As with the first assault, Archie did not report the second incident because she was afraid that respondent would retaliate by taking away her child. When she subsequently met respondent, he asked her whether she had "said anything" or "told anyone." He also asked "how her family life was going," a remark she interpreted as a threat to take away custody if she reported the assaults. J.A. 57-58.

b. The five misdemeanors involve respondent's sexual assaults on four other women. In 1989, respondent assaulted Sandra Sanders, whom he had hired to supervise the Youth Service Office of the Dyer County Juvenile Court. As part of her job, Sanders was required to attend weekly meetings with respondent in his chambers. During one of those meetings, respondent grabbed Sanders' breast. Sanders tried to remove his hand; she then stood up and walked out of his office. J.A. 15-17. Later, after a court session, respondent grabbed Sanders' buttocks. J.A. 18. He also, at a later meeting, pinned Sanders to the wall and kissed her on the lips. J.A. 18-19. Sanders did not report the incidents, because she thought that respondent had "so much influence in Dyersburg" that no one would believe her word over that of a judge (J.A. 22), but she did finally confront respondent and demand an apology. J.A. 19-20. Although respondent apologized, he began to find minor faults with the quality of her work, and eventually he demoted her. J.A. 21.

Respondents hired Patty Mahoney as his secretary in the autumn of 1990. She was recently divorced and had two young children to support. Within a day after she began the job, respondent began to touch her breasts and buttocks. He "hug[ged]" or "touch[ed]" her every day. J.A. 70. He soon became more aggressive and squeezed Mahoney's breast. J.A. 71. One day, Mahoney broke down crying, and told respondent that she needed the job and wanted him to leave her alone. He reacted by putting his arms around her, picking her off the floor, and aggressively hugging her. He also slid her down his body and ground his pelvis against her. Pet. App. 93a. When Mahoney told respondent that she could run out of the chambers screaming, he said, "I don't think you will do that because it would hurt you more than it would hurt me." J.A. 72. Mahoney quit the job after only two weeks because "it became clear to [her] that he was not going to leave [her] alone." J.A. 70. She did not report the incidents because she knew "the Laniers \* \* \* had always been in power," and she was afraid that no one would hire her if she reported respondent's behavior. J.A. 72.

In March, 1991, respondent sexually assaulted another of his secretaries, Sandy Attaway. After her first month of work, respondent began to make sexual remarks to her. He asked Attaway twice if she were afraid of him; when she responded (falsely) that she was not, he told her that "he was a judge, and everyone should be afraid of him." J.A. 32. One day, while wearing his judicial robe in his chambers, respondent walked behind Attaway, put his arms around her, and "pushed his pelvic area into [her] rear end and began grinding into [her]" with his erect penis. J.A. 30. Attaway did not quit because she

needed the job, but three months later, respondent fired her anyway, telling her that "things just weren't working out" between the two. J.A. 35. He subsequently told her that they "would have gotten along fine" if she had liked oral sex. J.A. 37.

In the Fall of 1991, respondent sexually assaulted Fonda Bandy, the local site coordinator for a federal program called "Drug Free Public Housing." The two were meeting in respondent's chambers concerning Bandy's proposal to implement parenting classes for parents in public housing who had children in juvenile court (over which respondent presided). J.A. 90-92. After Bandy finished her presentation, respondent put his arms around her, kissed her, firmly pulled her up to him, and fondled her breasts. When she tried to escape, he reached out and put his hand on her crotch. Pet. App. 99a-100a. Respondent told Bandy that, if she came back to see him, she would have all the clients she needed; she never returned, and he never sent her clients. J.A. 95. Bandy did not report the incident because respondent was "a very political person" and knew "a lot of important people." J.A. 105.

3. Respondent was indicted on 11 counts of violating 18 U.S.C. 242. Each count alleged that respondent had willfully subjected another person "to the deprivation of rights and privileges which are secured and protected by the Constitution, and the laws of the United States, namely, the right not to be deprived of liberty without due process of law, including the right to be free from willful[] sexual assault." J.A. 6-12. The district court dismissed one count at trial.<sup>2</sup>

<sup>2</sup> Before trial, respondent moved to dismiss the indictment on the ground that Section 242 is void for vagueness. That

In its instructions to the jury, the court explained that respondent was charged in each count with depriving another person of the right "not to be deprived of liberty without due process of law, specifically [the] right to be free from willful sexual assault." J.A. 186. The court charged that, included in the liberty protected by the Fourteenth Amendment "is the concept of personal bodily integrity and the right to be free of unauthorized and unlawful physical abuse by state intrusion." *Ibid.* It also instructed that the Due Process Clause protects against physical abuse when the conduct "is so demeaning and harmful under all the circumstances as to shock one's consci[ence]." *Ibid.* And it cautioned

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motion did not assert that respondent's alleged conduct did not violate a constitutional right. The trial court denied the motion, noting that this Court upheld the statute against a vagueness challenge in *Screws v. United States*, 325 U.S. 91 (1945). See Pet. App. 145a-147a. The court also stated that "[a]lthough the issue has not been raised, it is clear that existing law recognizes one's constitutional right to be free of coerced sexual acts such as intercourse or oral sex." *Id.* at 146a n.4.

After the government rested at trial, respondent moved for a judgment of acquittal on all counts, arguing, in part, that "no federal crime [had been] proved by the government." J.A. 110. That argument was based on the requirement of Section 242 that the conduct have occurred "under color of law," not on the contention that the government had not shown the deprivation of a constitutional right. *Ibid.* Respondent acknowledged that, except as to Count 9 (which alleged that, when he met with a woman in his chambers about her case, he exposed his genitals to her), he was "not alleging that there has been no deprivation of constitutional rights shown. I am satisfied that a deprivation of freedom on liberty from sexual assault is adequate." *Ibid.* The court denied the motion for acquittal at that time, Tr. 6-1000, but subsequently dismissed Count 9, Tr. 10-1738.

the jury that not "every unjustified touching or grabbing by a state official \* \* \* constitutes a violation of a person's constitutional rights. The physical abuse must be of a serious substantial nature that involves physical force, mental \* \* \* coercion, bodily injury or emotional damage which is shocking to one's consci[ence]." J.A. 186-187. Respondent did not object to those instructions. J.A. 189.

The jury returned verdicts of guilty on seven counts, and not guilty on three counts. With respect to the two counts involving the forcible oral rape of Vivian Archie, the jury found that Archie had suffered "bodily injury" from those assaults, which, under the text of Section 242, made respondent eligible for a maximum term of ten years' imprisonment on each of those counts. See Pet. App. 109a-111a. The court sentenced respondent to a ten-year prison term on each of those counts, and to the maximum one-year prison term available for each of the other counts, to be served consecutively, for a total term of 25 years' imprisonment, and all to be followed by two years' supervised release. *Id.* at 159a.

4. a. A unanimous panel of the court of appeals affirmed the convictions and sentence. Pet. App. 87a-143a.<sup>3</sup> On rehearing, however, a divided en banc court

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<sup>3</sup> The panel, rejecting respondent's contention that he had not deprived his victims of a constitutional right, concluded that "the government established that [respondent] violated the victims' constitutional right; namely, their right to bodily integrity. Further, the right to bodily integrity has been defined and made specific by court decision." Pet. App. 104a. "It is settled now," the panel continued, "that the Constitution places limits on a State's right to interfere with a person's . . . bodily integrity." *Ibid.* The panel also rejected respondent's contentions that he had not acted intentionally to deprive his

reversed and instructed the district court to dismiss the indictment. *Id.* at 1a-32a. Two of the 15 judges on the en banc court concurred in part and dissented in part. *Id.* at 33a-41a, 42a-49a. Four judges dissented. *Id.* at 47a-50a, 50a-56a, 57a-86a.

The majority opinion (Pet. App. 1a-33a) initially framed the question as whether "the sexual harassment and assault of state judicial employees and litigants by the judge violates" Section 242. Pet. App. 3a. The majority noted that Section 242 "does not specifically mention or contemplate sex crimes," *ibid.*, and "by its terms criminalizes violations of 'constitutional rights' only in the abstract, not conduct which is described specifically by federal or state statute," *id.* at 4a. It also noted the "fundamental principle limiting the judicial power to extend criminal statutes by interpretation," *ibid.*, since "[n]o matter how outrageous a defendant's actions may be, he has to be charged with the appropriate offense created by Federal law," *id.* at 5a.

The majority then concluded that sexual assault by a state actor is not punishable under Section 242 as a willful violation of rights protected by the Due Process Clause. It rejected the government's argument that, for purposes of Section 242, freedom from sexual assault by a state agent is part of a "general constitutional right against interference with 'bodily integrity' in a way that 'shocks the conscience.'"

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victims of their constitutional rights, and that he had not acted under color of law. *Id.* at 106a-107a. With respect to the latter point, the panel noted that "all of the assaults took place in [respondent's] chambers during working hours, \* \* \* during each assault there was at least an aura of official authority and power, [and] \* \* \* there was evidence that [respondent] used his position to intimidate his victims into silence." *Id.* at 108a.

Pet. App. 17a. "Conditioning the right on whether the particular acts of a defendant 'shock the conscience' leaves the definition of the crime up in the air \* \* \* [and] requires [jurors] to make an essentially arbitrary judgment. 'Shocks the conscience' is too indefinite to give notice of a crime" and "will yield results that depend too heavily on factual particularity of an individual set of events and upon biases and opinions of individual jurors." *Id.* at 19a-20a.

The court then addressed *Screws v. United States*, 325 U.S. 91 (1945), in which this Court rejected a challenge to Section 242 as void for vagueness. In *Screws*, a plurality of the Court stated that a defendant can know with sufficient definiteness "the range of rights that are constitutional" and are therefore protected from violation under Section 242 because that Section requires a specific intent to deprive a person of a right that has been "made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them." 325 U.S. at 104. Based on that language in *Screws*, the majority of the en banc court concluded that "the right not to be assaulted" had not been "made specific" because "it is not publicly known or understood that this right rises to the level of a 'constitutional right.' It has not been declared as such by the Supreme Court. It is not a right listed in the Constitution, nor is it a well-established right of procedural due process like the right to be tried before being punished." Pet. App. 28a.

The government had argued that the right under the Due Process Clause to be free from sexual assault by state officials (and indeed from unjustified brutal official assault generally) was well established by lower-court decisions. See Gov't En Banc C.A. Br.

7-10. The en banc court held, however, that such lower-court decisions are insufficient to support conviction under Section 242. "Only a Supreme Court decision with nationwide application can identify and make specific a right that can result in § 242 liability." Pet. App. 28a-29a.

The court also read *Screws* to require, for a conviction under Section 242 for the violation of a constitutional right protected by the Due Process Clause, that this Court "must not only enunciate the existence of [that] right, it must also hold that the right applies to a factual situation fundamentally similar to the one at bar." Pet. App. 29a. Thus, the majority stated, "[i]f the [Supreme] Court enunciates a right, but leaves some doubt or ambiguity as to whether that right will apply to a particular factual situation, the right has not been 'made specific' as is required under *Screws*." *Id.* at 29a-30a. It also remarked that "[t]he 'make specific' standard is substantially higher than the 'clearly established' standard used to judge qualified immunity in section 1983 civil cases." *Id.* at 30a. Applying that standard, the majority concluded that "sexual assaults may not be prosecuted as violations of a constitutional substantive due process right to bodily integrity," *id.* at 31a, and it ordered dismissal of the indictment, *id.* at 32a.

b. Judges Wellford and Nelson wrote separate opinions concurring in part and dissenting in part. Both concluded that the conduct underlying the misdemeanor counts did not reach the level of a constitutional violation, but both also concluded that the forcible oral rapes of Vivian Archie did reach that level, and that the rapes could be punished under Section 242 as violations of a constitutional right that had been made specific. Pet. App. 33a-41a, 42a-46a.

c. Judge Daughtrey wrote the principal dissenting opinion. Pet. App. 57a-86a.<sup>4</sup> She disagreed with the majority's reading of *Screws* as requiring Supreme Court decisions squarely on point to support a conviction under Section 242. She noted that, in discussing the problem of notice to the defendant, *Screws* adverted to the need for "decisions interpreting [the Constitution]," not only "Supreme Court decisions providing such interpretations," and that *Screws* referred to "the decisions of the courts" as a "source of reference for ascertaining the specific content of the scope of due process." Pet. App. 73a-74a. She stressed that problems of notice to the defendant were absent here, because, even if this Court had not delivered a decision directly on point, "all federal courts addressing analogous situations have accepted the long-standing existence and viability of a right to freedom from interference with bodily integrity." *Id.* at 74a.

"Even more troubling," Judge Daughtrey remarked, was that the majority had "reject[ed] or ignore[d]" Supreme Court decisions recognizing "a constitutional right to bodily integrity." Pet. App. 74a (citing *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), *Cruzan v. Missouri Dep't of Health*, 497 U.S. 261 (1990), *Youngberg v. Romeo*, 457 U.S. 307 (1982), and *Ingraham v. Wright*, 430 U.S. 651 (1977)). Although those decisions "do not specifically mention sexual assaults upon individuals under color of law, \* \* \* logical interpretations of existing law cannot be ignored by the courts simply because *factually*

<sup>4</sup> Judge Daughtrey's dissent was joined in full by Judges Keith and Moore. Judge Keith wrote a separate dissent (Pet. App. 47a-49a), and Judge Jones also dissented (*id.* at 50a-56a).

similar cases are not present[.]" Pet. App. 74a-75a. Indeed, Judge Daughtrey noted:

The easiest cases don't even arise. There has never been [for example,] a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages liability because no previous case had found liability in such circumstances.

*Ibid.* (citation omitted). "Likewise," she concluded, "this is the 'easy' case that demonstrates a blatant violation of those Supreme Court and court of appeals precedents that had 'made specific' the fact that interference with personal security and bodily integrity that shocks the conscience is proscribed by the substantive due process principles of the Fourteenth Amendment." *Ibid.*

#### SUMMARY OF ARGUMENT

I. The court of appeals erred in concluding that the willful violation of a constitutional right may not be punished under 18 U.S.C. 242 unless this Court has previously recognized and applied that right in a factually similar case. That reading of Section 242 is not supported by *Screws v. United States*, 325 U.S. 91 (1945). In *Screws*, the Court held that Section 242's element of willfulness requires a specific intent "to deprive a person of a right which has been made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them." 325 U.S. at 104. *Screws* did not hold that a prior decision of this Court on all fours is required for conviction under Section 242. This Court has, in fact, approved the use of the Recon-

struction Era criminal civil rights statutes to prosecute violations of constitutional rights even when those rights had not been previously recognized to be applicable in closely similar factual circumstances.

*Screws*' interpretation of the element of willfulness in Section 242 is grounded in concerns of notice. *Screws* sought to ensure that officials charged with enforcing facially valid local laws do not learn to their surprise that their conduct is prohibited by the Due Process Clause and may therefore be criminal. A prior decision of this Court squarely on point is not necessary to give potential defendants the required fair notice. If this Court has articulated the contours of a constitutional right, public officials have notice that they may not act willfully or recklessly in defiance of that right. Further, public officials are accustomed to consulting decisions of lower courts, as well as of this Court, to determine the legality of their conduct. And because Section 242's element of scienter requires proof that the defendant acted with specific intent to accomplish that which the statute prohibits—that is, with specific intent unjustifiably to invade legally protected interests—it is unlikely that any official will learn to his surprise that his conduct was criminally sanctionable. Thus, a defendant may be convicted under Section 242 for the willful violation of a constitutional right as long as it is clear that the right exists, and the decisional law shows the application of the right to the case at hand.

The court of appeals' insistence on a precedent of this Court on all fours with the prosecution is illogical, for it would prevent the government from prosecuting the most egregious constitutional violations, even when there is broad consensus that the

right exists and applies in a particular case. If the lower courts have reached such a consensus, a decision by this Court would be unlikely and unnecessary. Precisely for that reason, the court of appeals' rule would bar prosecution.

II. Decisions have "made specific," within the meaning of *Screws v. United States*, *supra*, that the Due Process Clause protects a constitutional right to bodily integrity, and have also made clear that that right includes the right to be free from wholly unjustified sexual assaults by state officials acting under color of law. The right to bodily integrity was recognized at common law, and has been recognized as protected by the Due Process Clause in a series of decisions of this Court dating back at least to *Rochin v. California*, 342 U.S. 165 (1952), and *Ingraham v. Wright*, 430 U.S. 651 (1977). Numerous decisions of the lower courts have elaborated upon that right to the point where it is clear beyond all doubt that an intentional sexual assault by a state official, lacking any conceivable justification, is a deprivation of liberty without due process of law, and therefore may be prosecuted under Section 242 as a willful violation of rights protected by the Constitution.

The court of appeals believed that a violation of the right to bodily integrity could not be punished under Section 242 because the government would have to show that the defendant's conduct "shocked the conscience" (which standard it found to be insufficiently precise for a criminal prosecution). That concern was mistaken; in a case like the present one, in which there is no conceivable justification for the official defendant's deliberate and serious intrusion on bodily integrity, the intrusion deprives the victim of liberty without due process. The "shock the con-

science" instruction given by the trial court was in fact to respondent's benefit, and in any event it was not insufficiently precise to guide the jury's discretion.

### ARGUMENT

#### I. THE WILLFUL VIOLATION OF A RIGHT PROTECTED BY THE DUE PROCESS CLAUSE MAY BE PUNISHED UNDER 18 U.S.C. 242 WITHOUT A PRIOR DECISION OF THIS COURT APPLYING THE RIGHT IN A FACTUALLY SIMILAR CASE

For decades, Section 242 of Title 18, United States Code, has been the primary tool for bringing to justice state officials who engage in the most egregious violations of constitutional rights, including rapes, beatings, and other unjustified assaults committed under color of law.<sup>5</sup> The court of appeals concluded, however, that under *Screws v. United States*, 325 U.S. 91 (1945), the willful violation of a right protected by the Due Process Clause of the Fourteenth Amendment may not be punished under Section 242 unless this Court has previously held "that the right applies to a factual situation fundamentally similar to the [case] at bar." Pet. App. 29a. That decision is contrary to this Court's precedents, unsupported by the reasoning of *Screws*, and illogical. If sustained, it would also be profoundly damaging to the national

<sup>5</sup> Section 242 has long been construed to punish the violations of all constitutional rights, including all rights protected by the Fourteenth Amendment. See *United States v. Price*, 383 U.S. 787, 793 (1966); *Williams v. United States*, 341 U.S. 97, 100 (1951); *Screws v. United States*, 325 U.S. 91, 98-100 (1945).

government's ability to protect its citizens from the most serious abuses of power by state officials.<sup>6</sup>

1. In *Screws*, the Court directly addressed the concern expressed by the court of appeals in this case—that, given the "broad and fluid definitions of due process" (325 U.S. at 95), a state official might be prosecuted under Section 242<sup>7</sup> for violating a constitutional right that he or she could not have known existed. See 325 U.S. at 95-97. The Court rejected the argument that the statute is unconstitutionally vague when applied to rights protected by the Due Process Clause, for it found that a narrowing construction of the Act refuted any concern that "the accused [could] be said to suffer from lack of warning or knowledge that the act which he does is a violation of law." *Id.* at 102. Specifically, the Court held that,

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Approximately 30 cases are prosecuted by the Department of Justice under Section 242 each year. Most involve brutal assaults by persons acting under color of law. Many are based on the Due Process Clause right to bodily integrity, because they arise out of situations, such as beatings of pretrial detainees, where the Fourth and Eighth Amendments do not apply. See *Graham v. Connor*, 490 U.S. 386, 392 n.6, 395 n.10 (1989). Since 1981, the Civil Rights Division of the Department of Justice has prosecuted at least 29 Section 242 cases involving sexual assaults by public officials; more than half of those cases were brought in the last five years. Typically, the victim in those cases is a woman who has been sexually assaulted by a jailor, police officer, or border patrol agent. Three cases, in addition to this case, involved sexual assaults by state judges; two of those cases resulted in guilty pleas, the other in acquittal.

<sup>7</sup> Section 242 (18 U.S.C.) and its companion conspiracy statute, 18 U.S.C. 241, have been renumbered several times. For simplicity, we generally refer to them herein by their current section numbers in Title 18 of the United States Code.

when Congress made only "willful" deprivations of constitutional rights subject to criminal punishment under the statute, it punished only acts "knowingly done with the purpose of doing that which the statute prohibits." *Ibid.* The Court described the specific intent required by Section 242 as "an intent to deprive a person of a right which has been made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them." *Id.* at 104. Under that construction, "the claim that the section lacks an ascertainable standard of guilt must fail," for the articulation of a constitutional right by the courts gives fair warning that an intentional deprivation of that right may be punished. *Id.* at 103-104.<sup>8</sup>

*Screws* therefore interpreted Section 242 as containing two related protections that, together, preclude any argument that the statute fails to give fair warning of the acts it prohibits. The first safeguard is that the Act's element of willfulness requires an "evil motive to accomplish that which the statute condemns." 325 U.S. at 101. "[T]he punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits." *Id.* at 102. Section 242 thus applies only when the defendant understands that he is unjustifiably invading a legally protected interest. Because one who acts with the specific intent required by the Act

<sup>8</sup> Although only four Justices joined the plurality opinion in *Screws*, that opinion has been taken in later cases as the opinion of the Court. See *United States v. Guest*, 383 U.S. 745, 753-754 (1966); *Price*, 383 U.S. at 793. The Court has also held that the same standard of specific intent applies to Section 242's companion conspiracy statute, 18 U.S.C. 241. See *Guest*, 383 U.S. at 753-754; *Price*, 383 U.S. at 806 n.20.

"is aware that what he does is precisely that which the statute forbids[,] [h]e is under no necessity of guessing whether the statute applies to him[,] \* \* \* for he either knows or acts in reckless disregard of its prohibition of the deprivation of a defined constitutional" right. *Id.* at 104.<sup>9</sup>

<sup>9</sup> It is not necessary to a conviction, however, that the defendant have been "thinking in constitutional terms," as long as his "aim was not to enforce local law but to deprive a citizen of a right and that right was protected by the Constitution." 325 U.S. at 106. Therefore, in a prosecution under Section 241 or 242, it need not be shown that the defendant "actually knew that it was a Constitutional right that [he was] violating or conspiring against." *United States v. O'Dell*, 462 F.2d 224, 232 n.10 (6th Cir. 1972). "[T]he specific intent required to violate section [242] is the purpose \* \* \* to commit acts which deprive a [person] of interests in fact protected by clearly defined constitutional rights." *United States v. Ehrlichman*, 546 F.2d 910, 922 (D.C. Cir. 1976). The question that must be asked is whether "the defendant commit[ted] the act in question with the particular purpose of depriving the \* \* \* victim of his enjoyment of the interests protected by [the] federal right." *Id.* at 921. In short, the defendant must "intend[] to accomplish that which the Constitution forbids." *United States v. Koon*, 34 F.3d 1416, 1449 (9th Cir. 1994), rev'd in part on other grounds, 116 S. Ct. 2035 (1996). The court of appeals panel correctly applied those standards and concluded that the proof established that respondent had acted willfully. Pet. App. 107a.

The en banc majority erred, however, in relying on its conclusion that the "literate public" does not specifically perceive the right to be free from sexual assault by state officials acting under color of law as a constitutional right. See Pet. App. 28a. We disagree with the court of appeals' understanding of public perception, but even if we put that point aside, the more fundamental point is that, under *Screws*, a defendant need not be specifically thinking "in constitutional terms" to violate Section 242. It is sufficient for conviction if (as here) the de-

The second safeguard is the requirement that the right in question have been previously "made specific" by a source of legal authority. In adopting that requirement, the Court stated that, without that construction, a law enforcement official might be convicted "if he does an act which some court later holds deprives a person of due process of law." 325 U.S. at 97. *Screws* therefore required, not only that the defendant have the specific intent to violate a constitutional right, but also that the right have been "made definite by decision or other rule of law." *Id.* at 103.

2. *Screws* refers to "decisions" interpreting the Constitution or laws; it does not limit the scope of Section 242 to the violation of rights that this Court has previously recognized as applying in a factually similar case. Indeed, that reading of *Screws* by the court of appeals cannot be squared with decisions of this Court in which the Court permitted prosecutions for violations of constitutional rights, even though the Court had not previously applied or recognized those rights in factually similar circumstances.

In *United States v. Guest*, 383 U.S. 745 (1966), for example, the Court held that private defendants could be prosecuted under Section 242's companion conspiracy statute, 18 U.S.C. 241, for conspiring to intimidate citizens from exercising their constitutional right to interstate travel. 383 U.S. at 757-760. The Court stated in *Guest* that the constitutional right to

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fendant understands that he is violating legally protected interests that are in fact protected by the Constitution—a point the court of appeals did not doubt in this case. See Pet. App. 28a ("The defendant certainly knew his conduct violated the law.").

interstate travel had been "firmly established and repeatedly recognized" in prior decisions. *Id.* at 757. Yet it was in *Guest* itself that the Court held, for the first time, that the right to travel included a right to be free from *private* interference with interstate travel—as the Court noted, *id.* at 759-760 n.17, and the dissent emphasized, *id.* at 766-767. Previously the Court had held only that the Constitution prohibited "governmental interference with the right of free interstate travel." See *id.* at 759 n.17. Some of the Court's prior decisions had in fact indicated that private interference with interstate travel was not addressed by the Constitution (as the government's brief in *Guest* acknowledged).<sup>10</sup> Nonetheless, the Court concluded that the reasoning in its prior interstate-travel decisions "fully support[ed] the conclusion" that the constitutional right was secured against private as well as governmental interference, *id.* at 760 n.17—even while noting that, under *Screws*, a "specific intent to interfere with the federal right must be proved," *id.* at 760. The Court found no conflict between *Screws* and its decision in *Guest* to apply the right to interstate travel to include freedom from private interference and simultaneously to permit a prosecution for a violation of that right.

Similarly, in *United States v. Classic*, 313 U.S. 299 (1941), the Court rejected a challenge to an indictment brought under the predecessors to Sections 241 and 242, charging the defendants with willfully al-

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<sup>10</sup> See U.S. Br. at 55, *United States v. Guest*, 383 U.S. 745 (1966) (No. 65) (stating that language in *United States v. Wheeler*, 254 U.S. 281 (1920), discussing the right to interstate travel "was not necessary to the decision and \* \* \* should not be followed").

tering and falsifying ballots in a Democratic party primary election held to nominate a candidate for a congressional election. The Court held in *Classic*, for the first time, that the federally protected right to vote in congressional elections includes "the right of the elector to have his ballot counted at the primary." 313 U.S. at 318. It also held that willful violations of that right could be prosecuted under the Reconstruction Era statutes, even though one of its previous decisions had expressly reserved judgment on the question whether the constitutional right to vote extended to primary elections, and a plurality of the Court in another case had stated that it did not. See *id.* at 317. The Court rejected the dissent's argument that, since Congress's intent to cover primary voting was "none too clear," the criminal statutes should be construed narrowly so as to reach only "the rights plainly and directly guaranteed by the Constitution." *Id.* at 334. Rather, the Court concluded that the right had been declared with sufficient specificity for prosecution to be warranted, even if the case then before it involved a violation of the right not previously encountered by the Court:

Differences of opinion have arisen as to the effect of the primary in particular cases on the choice of representatives. But we are troubled by no such doubt here. Hence, the right to participate through the primary in the choice of representatives in Congress—a right clearly secured by the Constitution—is within the words and purpose of [the statute] in the same manner and to the same extent as the right to vote at the general election.

\* \* \* It is no extension of the criminal statute  
\* \* \* to find a violation of it in a new method of

interference with the right which its words protect. For it is the constitutional right, regardless of the method of interference, which is the subject of the statute and which in precise terms it protects from injury and oppression.

*Id.* at 323-324.<sup>11</sup>

3. a. The reasoning of *Screws* does not support the court of appeals' decision that a prior Supreme Court decision directly on point is required in order to make a right sufficiently specific to permit a conviction under Section 242. Such a requirement is far more onerous than necessary to address the concerns of fair notice raised in *Screws*, and would seriously impair the government's ability to prosecute the most serious violations of constitutional rights.

A principal concern of *Screws* is notice to the defendant. Without a limiting construction of Section 242, the Court stated, "[t]hose who enforce local law today might not know for many months (and meanwhile

<sup>11</sup> *Classic* was decided before *Screws*, in which the Court definitively construed the element of willfulness in Section 242. The Court made clear in *Screws*, however, that the right to vote in primary elections at issue in *Classic* met the standard of specificity later established in *Screws*. In *Screws*, the Court noted that "[t]he indictment [in *Classic*] was sufficient since it charged a willful failure and refusal of the defendant election officials to count the votes cast," and since "[t]he right so to vote is guaranteed by Art. I, § 2 and § 4 of the Constitution." 325 U.S. at 106. Even though the right to vote in congressional elections had not previously been recognized in the context of primary elections, the "charge [was] adequate since he who alters ballots or without legal justification destroys them would be acting willfully in the sense in which [the statute] uses the term." *Ibid.* See also *id.* at 121-122 (Rutledge, J., concurring in the result) (noting that *Classic* addressed and rejected the claim of unconstitutional vagueness in Sections 241 and 242).

could not find out) whether what they did deprived someone of due process of law." 325 U.S. at 97. A prior decision of this Court applying a constitutional right in closely similar factual circumstances is, however, not necessary to ensure adequate notice to defendants. The requisite notice might be obtained from a number of sources, separately or in combination: from decisions of this Court establishing the contours of a constitutional right so as to show its applicability to the case at hand, even if not actually applying it in factually similar circumstances; from lower-court decisions demonstrating a consensus that the constitutional right exists in similar circumstances; and from the general legal background, if that background is sufficiently clear to show that the "traditions and conscience of our people" (*Screws*, 325 U.S. at 95) require recognition of a constitutional right and its application to the case.

The court of appeals' rule that the right must have been previously applied in a *factually similar case*, in particular, is unrealistic and unnecessary to ensure that potential defendants have notice that their conduct is prohibited by Section 242. Once a constitutional right (such as the right to bodily integrity) has been clearly recognized, public officials are charged with knowing that intentional violations of that legally protected interest may be punished under the law, even if those violations might occur in different factual contexts from the violations already condemned by the courts. A stricter rule would mean that factual distinctions of no consequence would

insulate defendants from criminal liability for intentional violations of constitutional rights.<sup>12</sup>

In the analogous area of qualified immunity to lawsuits brought under 42 U.S.C. 1983, the Court has rejected the suggestion that a right cannot be "clearly established" unless it has been recognized in a closely similar case (much less a closely similar case in this Court): "We do not suggest that an official is always immune from liability or suit for a warrantless search merely because the warrant requirement has never explicitly been held to apply to a search conducted in identical circumstances." *Mit-*

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<sup>12</sup> *Lynch v. United States*, 189 F.2d 476 (5th Cir.), cert. denied, 342 U.S. 831 (1951), and *United States v. Dise*, 763 F.2d 586 (3d Cir.), cert. denied, 474 U.S. 982 (1985), are examples of cases that might have been decided differently under the court of appeals' rule, and they show the dangers of that rule. In *Lynch*, the Fifth Circuit concluded that the defendant law enforcement officers could be convicted under Section 242 for "hand[ing] over" blacks who had been arrested to members of the Ku Klux Klan, who then beat the arrested men severely. 189 F.2d at 478. The Fifth Circuit relied on *Screws* to sustain the conviction, but *Screws* did not involve "handing over" arrested men to a private mob; it involved a murderous assault by the officers themselves. *Dise* was a prosecution against an employee of an institution for the mentally disabled for beating inmates. The Third Circuit rejected the defendant's contention that he could not be convicted under Section 242 because the incidents took place before *Youngberg v. Romeo*, 457 U.S. 307 (1982), in which this Court considered "for the first time the substantive rights of involuntarily committed mentally retarded persons under the Fourteenth Amendment," *id.* at 314. In both cases, the rule adopted by the court of appeals in this case might have compelled reversal of the convictions, because the right involved had not previously been applied by this Court "to a factual situation fundamentally similar to the one at bar."

*chell v. Forsyth*, 472 U.S. 511, 535 n.12 (1985). "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, \* \* \* but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

Nor is decisional law of *this Court* necessary to give constitutionally sufficient notice to defendants that their actions may violate Section 242. Public officials are accustomed to consulting a wide variety of legal sources to determine the legal constraints on their actions—not just to protect themselves from civil and criminal liability, but also to determine whether a contemplated course of action is permissible within the legal norms already declared by the courts. Indeed, given the relatively small number of cases decided by this Court, the decisions of state and lower federal courts on constitutional issues may be the case law most directly relevant to many aspects of governmental decision-making. Once it is apparent from a consensus of lower-court decisions that a certain course of conduct would be unconstitutional, an official acts at his or her peril if he or she nevertheless embarks on such conduct. Such an official "acts in defiance of announced rules of law." *Screws*, 325 U.S. at 104.<sup>13</sup>

<sup>13</sup> In the context of qualified immunity under 42 U.S.C. 1983, this Court has not expressly decided whether a decision of this Court is necessary to demonstrate the existence of "clearly established" constitutional rights. See *Mitchell v. Forsyth*, 457

Thus, when this Court's decisions articulating a constitutional right and lower-court decisions applying that right clearly show that a legal interest (such as the interest in bodily integrity) is protected by the Constitution, a deliberate unjustified violation of that interest by an official acting under color of law may be punished under Section 242. In such circumstances, the defendant is not forced to guess at the actions that the statute makes criminal, and "he hardly may be heard to say that he knew not what he did." *Screws*, 325 U.S. at 105. This case well illustrates that point; although there is no Supreme Court decision on all fours with this case, forcible rape or sexual assault by a state official, using the authority of his office to coerce his victims, clearly invades the constitutional interest in bodily integrity and deprives the official's victims of their liberty without due process. See pp. 35-45, *infra*.

b. The court of appeals also failed to consider the significance of Section 242's requirement of specific intent. In a prosecution under Section 242, the government must prove that the defendant acted inten-

U.S. at 818 n.32; *Procunier v. Navarette*, 434 U.S. 555, 565 (1978). In *Navarette*, the plaintiff (respondent in this Court) relied on lower-court decisions to argue that the First Amendment rights of state prisoners with respect to outgoing mail had been clearly established. The Court examined those decisions but found them insufficient to establish clearly that prisoners had First Amendment rights in outgoing mail. *Id.* at 563-564. In *Davis v. Scherer*, 468 U.S. 183 (1984), both the majority and the partial dissent considered court of appeals precedents in deciding whether the defendants (appellants in this Court) had violated a public employee's constitutional right to a pre-termination hearing. See *id.* at 191-192 (opinion of the Court); *id.* at 203-205 (Brennan, J., concurring in part and dissenting in part).

tionally or recklessly to do "that which the statute prohibits." *Screws*, 325 U.S. at 102; see *id.* at 101 ("[a]n evil motive to accomplish that which the statute condemns"). That is, it must be shown that the defendant knew (or recklessly disregarded the likelihood) that his actions would violate another person's legally protected interests.<sup>14</sup> Where such specific intent is proved,

the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of the law. The requirement that the act must be willful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain. But it does relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware.

*Id.* at 102. Because Section 242 requires proof of specific intent, there is consequently no danger that (as the court of appeals feared) a defendant will learn to his surprise that his actions violated a constitutional right.

This Court has in a number of cases addressed the relationship between an intent requirement and the

<sup>14</sup> In contrast, liability in a civil action brought under 42 U.S.C. 1983 does not require any showing of specific intent, see *Daniel v. Williams*, 474 U.S. 327, 329-330 (1986); *Parratt v. Taylor*, 451 U.S. 527, 534-535 (1981), although such intent may be relevant to an award of punitive damages, see *Smith v. Wade*, 461 U.S. 30 (1983). The requirement of specific intent has been viewed as a high hurdle to successful prosecutions under Section 242. See Harry H. Shapiro, *Limitations in Prosecuting Civil Rights Violations*, 46 Cornell L.Q. 532, 537 (1961); Tom C. Clark, *A Federal Prosecutor Looks at the Civil Rights Statutes*, 47 Columbia L. Rev. 175, 183 (1947).

contention that a statute failed adequately to specify the acts that were made illegal. See *Posters 'N' Things, Ltd. v. United States*, 114 S. Ct. 1747, 1754 (1994); *United States v. United States Gypsum Co.*, 438 U.S. 422, 434-446 (1978); *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499-504 (1982). In *Hoffman Estates*, the Court noted that "a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed." *Id.* at 499; see *ibid.* n.14 (citing, *inter alia*, *Screws*). The Court held in that case that scienter requirements in the challenged ordinance made the reach of the statute "sufficiently clear" to satisfy due process. 455 U.S. at 502.

*United States Gypsum* involved a criminal prosecution of manufacturers for exchanging price information, allegedly in violation of the Sherman Act. The defendants contended that, in light of the Sherman Act's "vague" and "general" standards of liability, it would be unfair to convict them for violating a rule of antitrust law by actions taken before that rule had been established by the courts in a civil case. The Court recognized that the Sherman Act is defined by "open-ended and fact-specific standards like the 'rule of reason,'" and "has been construed to have a 'generality and adaptability comparable to that found to be desirable in constitutional provisions.'" 434 U.S. at 438-439. It held, however, that criminal prosecutions for Sherman Act violations require proof of intent. 438 U.S. at 435. It therefore ruled that the government must show, in a criminal antitrust prosecution, that the defendant acted "with knowledge that the proscribed [anti-competitive] effects would most likely follow" from its actions. *Id.* at 444. As long as

"the defendants are consciously behaving in a way the law prohibits, \* \* \* such conduct is a fitting object of criminal punishment." *Id.* at 445.

Those decisions, along with *Screws* itself, show that a prior decision of this Court in a factually similar case is not necessary to prevent unfairness to a defendant charged with the willful violation of rights protected by the Due Process Clause. Since it must always be shown that the defendant acted with intent to deprive a person of legally protected rights, rather than to enforce a facially valid state law or policy, there is no danger that an innocent state official would learn to his surprise that his conduct can be the subject of a criminal prosecution. "Th[e] requirement of the presence of culpable intent as a necessary element of the offense does much to destroy any force in the argument that application of the [Act]" in these circumstances would be unfair. *Boyce Motor Lines, inc. v. United States*, 342 U.S. 337, 342 (1952). See also *United States v. Ragen*, 314 U.S. 513, 524 (1942) (rejecting argument that defendant could not be punished for willful tax evasion based on claiming deductions for salaries that were more than "reasonable," since "[a] mind intent upon willful evasion is inconsistent with surprised innocence").

4. The court of appeals' rule is illogical, and would lead to perverse results. In particular, it would lead to the result that the clearest and most obvious violations of constitutional rights could not be prosecuted under Section 242.

Some violations of constitutional rights are so plain that this Court has never been called upon to address them directly; yet, under the court of appeals' decision, the national government could not use the

criminal law in those circumstances to vindicate those civil rights.<sup>15</sup> Under the court of appeals' decision, even if every federal court of appeals had recognized a right under the Due Process Clause to be protected from rape by a state official acting under color of law, the government nevertheless could not prosecute such rapes under Section 242 if this Court had not also expressly recognized that right on similar facts; the right would not have been "made specific" by "decisions of the courts," under the court of appeals' reading of *Screws*. But if the lower courts were unanimous in finding a due process violation, review by this Court would be both unnecessary and unlikely. Thus, the most outrageous abuses of constitutional rights by state actors would be placed outside the reach of Section 242, precisely because there was broad consensus that those rights were constitutionally protected.

The court of appeals' rule would also lead to the result that members of the general public free from official restraint on their liberty would have less protection against rapes and brutal assaults by state officials than persons who are in custody, such as persons who are being arrested and convicted prisoners. Persons undergoing arrest have the protec-

<sup>15</sup> Indeed, some constitutional rights are so plainly protected that no court has been required to address them in a published decision. As Judge Daughtrey, and before her, Judge Posner, have noted, "[t]he easiest cases don't even arise. There has never been \* \* \* a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages liability because no previous case had found liability in those circumstances." Pet. App. 75a (quoting *K.H. through Murphy v. Morgan*, 914 F.2d 846, 851 (7th Cir. 1990)).

tion of the Fourth Amendment against unreasonable searches and seizures, and convicted prisoners have the protection of the Eighth Amendment against cruel and unusual punishments. Both of those Amendments provide protection against rapes and unjustified beatings by officials.<sup>16</sup> It would be peculiar, to say the least, if persons who are not in custody do not have at least the same protection from rapes and beatings by officials.<sup>17</sup> Yet, even though the government can now plainly prosecute a prison guard for raping a convicted felon, the court of appeals' rule would prevent the government from prosecuting a state official for using his state office to rape a pretrial detainee or a person who is not in custody, merely because this Court has never expressly held that the Due Process Clause of the Fourteenth Amendment prevents state officials from abusing their authority in that fashion.

<sup>16</sup> See *Graham v. Connor*, 490 U.S. 386 (1989); *Whitley v. Albers*, 475 U.S. 312 (1986).

<sup>17</sup> The "less protective Eighth Amendment standard" of the Cruel and Unusual Punishments Clause "applies 'only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions.'" *Graham*, 490 U.S. at 398-399 (quoting *Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977)). When the Court held in *Youngberg v. Romeo*, 457 U.S. 307 (1982), that inmates of an institution for the mentally disabled have a right to personal security protected by due process, it noted, "[i]f it is cruel and unusual punishment [under the Eighth Amendment] to hold convicted criminals in unsafe conditions, it must be unconstitutional to confine the involuntarily committed—who may not be punished at all—in unsafe conditions." *Id.* at 315-316.

## II. THE COURTS HAVE MADE CLEAR THAT THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT PROTECTS THE RIGHT TO BE FREE FROM WHOLLY UNJUSTIFIED INTRUSIONS ON BODILY INTEGRITY

Respondent was convicted in this case for violating his victims' constitutional right to bodily integrity, protected by the Due Process Clause of the Fourteenth Amendment. J.A. 6-11, Pet. App. 157a. Under the standards we have outlined above, that right has been "made specific" within the meaning of *Screws*. This Court has recognized, in a variety of contexts, a due process right to be free from forcible, wholly unjustified, intrusions on personal bodily integrity. The lower courts have also recognized that right, and have applied it in cases closely similar to this one.

1. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." *Planned Parenthood v. Casey*, 505 U.S. 833, 847 (1992). Certain "attributes of personhood" (*id.* at 851) are recognized as so fundamental that they receive protection under the Due Process Clause as a matter of substantive liberty. At the core of that concept is the right to bodily integrity, free from wholly unjustified deliberate intrusions at the hands of government officials.

The "right of personal security" was recognized by Blackstone as among the core personal rights protected by the common law. See 1 William Blackstone, *Commentaries on the Laws of England* 125-130 (facsimile ed. 1979) (Blackstone).<sup>18</sup> Speaking specifi-

<sup>18</sup> Much of Blackstone's discussion of the individual's right to personal security concerns the right against arbitrary

cally of the protection afforded by that right to be free from unjustified deprivations of life and limb, Blackstone emphasized that arbitrary deprivations undertaken for impermissible and unjustified reasons were contrary to the Magna Carta's requirement that the sovereign act in accordance with "the law of the land":

Yet nevertheless [life] may, by the divine permission, be frequently forfeited for the breach of those laws of society, which are enforced by the sanction of capital punishments[.] \* \* \* At present, I shall only observe, that whenever the *constitution* of a state vests in any man, or body of men, a power of destroying at pleasure, without the direction of laws, the lives or members of the subject, such constitution is in the highest degree tyrannical: and that whenever any *laws* direct such destruction for light and trivial causes, such laws are likewise tyrannical, though in an inferior degree; because here the subject is aware of the

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deprivations of life and limb. He makes clear, however, that, "the rest of his person or body is also entitled by the *same natural right* to security from the corporal insults of menaces, assaults, beating, and wounding; though such insults amount not to destruction of life or member." 1 Blackstone, *supra*, at 130 (emphasis added). He also makes clear that the right to personal security is in addition to, and separate from, the right to "the personal liberty of individuals," in the sense of "the power of loco-motion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law." *Ibid.* Thus, it is clear that the personal "liberty" protected by due process includes the right to be free from unjustified assaults, and is not limited to the right to be free from unjustified restraint.

danger he is exposed to, and may by prudent caution provide against it. The statute law of England does therefore very seldom, and the common law does never, inflict any punishment extending to life or limb, unless upon the highest necessity: and the constitution is an utter stranger to any arbitrary power of killing or maiming the subject without the express warrant of law. "*Nullus liber homo, says the great charter, aliquo modo destruatur, nisi per legale iudicium parium suorum aut per legem terrae.*"

*Id.* at 129.

This Court accordingly recognized over a century ago that "[n]o right is held more sacred, or is more carefully guarded, by common law, than the right of every individual to the possession and control of his own person, free from all restraint and interference of others, unless by clear and unquestionable authority of law." *Union Pacific Ry. v. Botsford*, 141 U.S. 250, 251 (1891). Although that case was not expressly decided under the Due Process Clause, it clearly recognized that any intrusion on bodily integrity by a government official must be undertaken for a permissible purpose, justified by clear legal authority.<sup>19</sup> See also *ICC v. Brimson*, 154 U.S. 447, 479 (1894); *In*

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<sup>19</sup>The question presented in *Botsford* was whether a federal court sitting in diversity in a personal injury case had authority to order the plaintiff to undergo a surgical examination. See 141 U.S. at 250-251. This Court has relied on *Botsford* as support for the conclusion that "a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment." *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 269, 278 (1990); *id.* at 288 (O'Connor, J., concurring).

re *Pacific Ry. Comm'n*, 32 F. 241, 250 (C.C.N.D. Cal. 1887) (Field, J.).

This Court has recognized the right to personal security in a variety of contexts. In *Rochin v. California*, 342 U.S. 165 (1952), the Court held that due process was violated by the forcible administration of a "stomach pumping" solution to recover evidence swallowed by an arrestee, finding that "[t]his is conduct that shocks the conscience," *id.* at 172. The Court stressed the "general requirement" that "States in their prosecutions respect certain decencies of civilized conduct," *id.* at 173, and avoid "force so brutal and so offensive to human dignity," *id.* at 174.

In *Ingraham v. Wright*, 430 U.S. 651 (1977), the Court expressly recognized a due process right to personal security, and concluded that the right was implicated by corporal punishment in public schools. The Court stated that "[t]he liberty preserved from deprivation without due process included the right 'generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men,'" *id.* at 673 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)), and it stressed that "[a]mong the historic liberties so protected was a right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security." *Ibid.* & n.41 (citing, *inter alia*, Blackstone).

The Court relied squarely on *Ingraham* in *Vitek v. Jones*, 445 U.S. 480, 492 (1980), where it held that compelled treatment of a prisoner in a mandatory "behavior modification" program implicated a liberty interest protected by due process. And in *Youngberg v. Romeo*, 457 U.S. 307, 315-316 (1982), the Court, relying on both *Ingraham* and *Vitek*, reiterated that

"the right to personal security constitutes a 'historic liberty interest' protected substantively by the Due Process Clause."<sup>20</sup>

In a closely related context, the Court has stated that there is a "constitutionally protected liberty interest in refusing unwanted medical treatment." *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 278 (1990). Justice O'Connor, concurring in *Cruzan*, observed that the liberty interest at issue there "flows from decisions involving the State's invasions into the body," and noted that "state incursions into the body [are] repugnant to the interests protected by the Due Process Clause." *Id.* at 287. And in *Riggins v. Nevada*, 504 U.S. 127 (1992), the Court held that the forced administration of antipsychotic medication to a pretrial detainee violated the Due Process Clause. *Id.* at 133-134. The Court stressed there that "forcing antipsychotic drugs on [a

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<sup>20</sup> *Ingraham*, *Vitek*, and *Youngberg* are not distinguishable on the ground that they arose in contexts where the plaintiffs lacked the full measure of liberty enjoyed by free persons generally (schools, prisons, psychiatric institutions). To the contrary, the principal question in those cases was whether those special settings extinguished the right to personal security that free persons would otherwise enjoy; the existence of the basic right was unquestioned. In *Ingraham*, for example, the Court noted that, "[b]ecause it is rooted in history, the child's liberty interest in avoiding corporal punishment while in the care of public school authorities is subject to historical limitations," 430 U.S. at 675, and it relied on historically rooted common law privileges and damages remedies to hold that Florida did not deprive school children of their right to personal security without due process of law, *id.* at 674-683. In *Youngberg*, the Court stressed that the right to personal security "is not extinguished by lawful confinement, even for penal purposes." 457 U.S. at 315.

person] is impermissible absent a finding of overriding justification and a determination of medical appropriateness." *Id.* at 135. See also *Washington v. Harper*, 494 U.S. 210, 221-222 (1990) (due process liberty interest protects against "unwanted administration" of medical procedures). Most recently, in *Planned Parenthood v. Casey*, the Court again held that the Constitution places limits on a state's right to interfere with bodily integrity. See 505 U.S. at 869 (joint opinion) (stressing "the urgent claims of the woman to retain the ultimate control over her \* \* \* body, claims implicit in the meaning of liberty"). "Short of attempting to catalogue every possible factual situation involving an intrusion upon personal security or bodily integrity, it is impossible to see how the \* \* \* Court could have more explicitly stated over the years that violations of that precious right cannot be tolerated in a free and civilized society." Pet. App. 76a (Daughtrey, J., dissenting).

What is clear from the Court's decisions is that intrusions by officials on bodily integrity must, *at a minimum*, be justified by a permissible governmental purpose to satisfy due process. When a constitutionally protected liberty interest is at stake, there must be at least a legitimate basis for its deprivation by state officials. See *Ingraham*, 430 U.S. at 675. As the Court stressed in *Riggins*, an intrusion on bodily integrity by state officials cannot be justified "without making *any* determination of the need for [such a] course or *any* findings about reasonable alternatives." 504 U.S. at 136. Thus, it is clear that a violation by a government official of the right to personal security without *any legitimate reason whatsoever* is an unconstitutional deprivation of liberty without

due process of law. Forcible rape and sexual assault clearly constitute such wholly illegitimate violations.

2. The lower federal courts, following the decisions of this Court discussed above, have squarely and repeatedly held that a state official's intrusion on the body for no permissible purpose (such as a sexual assault) is a violation of the right to bodily integrity protected by the Due Process Clause. In *Stoneking v. Bradford Area School District*, 882 F.2d 720, 727 (3d Cir. 1989), cert. denied, 493 U.S. 1044 (1990), the Third Circuit relied on *Ingraham* for the conclusion that "[a] teacher's sexual molestation of a student is an intrusion of the schoolchild's bodily integrity not substantively different for constitutional purposes from corporal punishment by teachers." The court stated that "the constitutional right *Stoneking* alleges, to freedom from invasion of her personal security through sexual abuse, was well-established" by the early 1980s, 882 F.2d at 726, and it noted that, "[s]ince a teacher's sexual molestation of a student could not possibly be deemed an acceptable practice, as some view teacher-inflicted corporal punishment, a student's right to be free from such molestation may be viewed as clearly established even before *Ingraham*." *Id.* at 727.<sup>21</sup>

Similarly, the Fifth Circuit, in *Doe v. Taylor Independent School District*, 15 F.3d 443 (en banc), cert. denied, 115 S. Ct. 70 (1994), held that a teacher's sexual abuse of a student "deprived [the student] of a liberty interest recognized under the substantive due process component of the Fourteenth Amendment."

<sup>21</sup> As we explain at p. 39 n.20, *supra*, cases like *Stoneking* cannot be distinguished from this one on the ground that they involve schoolchildren.

15 F.3d at 451. The court also found it "crystal clear" that "[n]o reasonable public school official in 1987 would have assumed that he could, with constitutional immunity, sexually molest a minor student." *Id.* at 455.<sup>22</sup>

Other courts have recognized as well the due process right to be free from sexual assault by officials. In *Dang Vang v. Vang Xiong X. Toyed*, 944 F.2d 476, 479 (9th Cir. 1991), a case involving the "under color of state law" element of Section 1983, the court concluded that the plaintiff's constitutional rights were violated when she was raped by a state welfare official. In *Wedgeworth v. Harris*, 592 F. Supp. 155, 159 (W.D. Wis. 1984), the court, relying on *Rochin*, held that a police officer's sexual assault violated the victim's constitutional right to bodily integrity. In *Gilson v. Cox*, 711 F. Supp. 354 (E.D. Mich. 1989), the court held that a male inmate stated a claim under Section 1983 based on a female corrections officer physically abusing him by grabbing his genitals and buttocks, and thereby violating his right to be free from sexual abuse. See also *Stacey v. Ford*,

<sup>22</sup> See also *Doe v. Rains County Indep. Sch. Dist.*, 66 F.3d 1402, 1406-1407 (5th Cir. 1995) (teacher's sexual abuse of student violates due process liberty interest; due process protects "freedom from sexual abuse by persons wielding state authority," and "Supreme Court precedent has ended that precise debate"); *Walton v. Alexander*, 44 F.3d 1297, 1302 (5th Cir. 1995) (en banc) (stating, in case involving sexual assault on a student, that "[t]he right to be free of state-occasioned damage to a person's bodily integrity is protected by the fourteenth amendment guarantee of due process"); *Wassum v. City of Bellaire*, 861 F.2d 453, 454-455 (5th Cir. 1988) ("No one questions the district court's determination that [a police officer] violated [his fellow police officer's] constitutional rights when he brutally raped her.").

554 F. Supp. 8 (N.D. Ga. 1982) (same). Other reported decisions involve prosecutions under Section 242 based on the deprivation of the constitutional right to be free from interference with bodily integrity by sexual assault. See *United States v. Contreras*, 950 F.2d 232, 235-236 (5th Cir. 1991) (police officer convicted of violating Section 242 by sexually assaulting a woman he had detained), cert. denied, 504 U.S. 941 (1992); *United States v. Davila*, 704 F.2d 749 (5th Cir. 1983) (border patrol officers convicted for coercing sex from two women they had detained); *United States v. Brummett*, 786 F.2d 720 (6th Cir. 1986).

In cases involving non-sexual assaults, the courts have also frequently recognized and applied the due process right to be free from wholly unjustified interference with bodily integrity. The leading decision is *Johnson v. Glick*, 481 F.2d 1028, 1032, cert. denied, 414 U.S. 1033 (1973), a case involving the beating of a pretrial detainee, in which the Second Circuit, relying on *Rochin*, concluded that, "quite apart from any 'specific' of the Bill of Rights, application of undue force by law enforcement officers deprives a suspect of liberty without due process of law." In *Gregory v. Thompson*, 500 F.2d 59, 62 (9th Cir. 1974), which arose out of a magistrate's assault on a person in his courtroom, the court ruled that the case implicated the "right to be secure in one's person \* \* \* grounded in the due process clause of the Fourteenth Amendment."<sup>23</sup> In *Shillingford v.*

<sup>23</sup> The Sixth Circuit had earlier held, in a Section 1983 suit against a juvenile court magistrate alleging a deprivation of liberty arising out of the magistrate's assault on an arrestee, that the magistrate was not entitled to judicial immunity, and had acted under color of state law. *Lucarell v. McNair*, 453 F.2d 836 (1972).

*Holmes*, 634 F.2d 263 (5th Cir. 1981), the court, relying on *Johnson*, concluded that a police officer's assault on a tourist photographing an arrest stated a claim of deprivation of liberty without due process. In *United States v. Messerlian*, 832 F.2d 778, 790 & n.20 (3d Cir. 1987), cert. denied, 485 U.S. 988 (1988), a Section 242 prosecution involving the killing of an arrestee while in police custody, the court noted that it had "consistently acknowledged that the Fourteenth Amendment's guarantee of personal security includes protection from unwarranted invasion" by officials.<sup>24</sup> See also *Fernandez v. Leonard*, 784 F.2d 1209 (1st Cir. 1986) (intentional shooting by police of kidnapping victim violates right to bodily integrity). And in several cases involving claims of excessive corporal punishment or other unjustified assaults on students by public school personnel, the courts of appeals (including the circuit in which this case arose) have relied on *Rochin*, *Ingraham*, and *Johnson* to find that those claims implicated the right to bodily security protected by the Due Process Clause.<sup>25</sup>

<sup>24</sup> Other reported cases involving Section 242 prosecutions for non-sexual assaults also gave notice that the Due Process Clause protects the right to bodily integrity against wholly unjustified state intrusion. See *United States v. Dise*, 763 F.2d 586, 588-589 (3d Cir. 1985) (beating of psychiatric institution inmates violated their right to personal security and freedom from bodily restraint); *United States v. Cobb*, 905 F.2d 784, 788 (4th Cir. 1990) (beating of pre-trial detainee), cert. denied, 498 U.S. 1049 (1991); *United States v. Tarpley*, 945 F.2d 806 (5th Cir. 1991) (assault by deputy sheriff on wife's former lover), cert. denied, 504 U.S. 917 (1992).

<sup>25</sup> See *Metzger v. Osbeck*, 841 F.2d 518, 520 (3d Cir. 1988); *Webb v. McCullough*, 828 F.2d 1151, 1158 (6th Cir. 1987); *Garcia v. Miera*, 817 F.2d 650, 653-656 (10th Cir. 1987), cert. denied, 485 U.S. 959 (1988); *Hall v. Tawney*, 621 F.2d 607, 613

At the time the incidents in this case took place, therefore, there was a clear consensus in the courts that serious assaults by state officials using the power of their office without justification violate the right to bodily integrity protected by the Due Process Clause.<sup>26</sup> And as the courts also have recognized, rape and sexual assault by state officials under color of law violate due process because they are invasions of bodily integrity that can *never* have a permissible justification.

3. The court of appeals believed, however, that respondent could not be convicted under Section 242 for committing sexual assaults under color of law because the jury was told that, to establish a due process violation, the government would have to show that the sexual assaults "shock[ed] the conscience." Pet. App. 18a-19a. The court reasoned that "[s]hocks the conscience" is too indefinite to give notice of a crime" and "will yield results that depend too heavily on factual particularity of an individual set of events and upon biases and opinions of individual jurors." *Id.* at 19a.

The court of appeals misunderstood the function of the "shock the conscience" language in the jury instructions in this case. See J.A. 186-187. That

(4th Cir. 1980). *Hall*, in particular, relied on *Rochin* and *Johnson* to conclude that the "right to ultimate bodily security \* \* \* is unmistakably established in our constitutional decisions as an attribute of the ordered liberty that is the concern of substantive due process." *Ibid.*

<sup>26</sup> We are aware of only one reported decision after *Ingraham* that may be to the contrary. See *Skinner v. City of Miami*, 62 F.3d 344 (11th Cir. 1995) (divided panel holding that "hazing" of a firefighter by his fellow firefighters did not violate his substantive due process rights).

language, drawn from this Court's decision in *Rochin* (see p. 38, *supra*), was to respondent's benefit (and indeed respondent did not object to it, see J.A. 189). The trial court correctly charged the jury that the constitutional right to bodily integrity includes the right "to be free from willful sexual assault." J.A. 186; see also *ibid.* ("Included in the liberty protected by the Fourteenth Amendment is the concept of personal bodily integrity and the right to be free of unauthorized and unlawful physical abuse by state intrusion. \* \* \* Freedom from such physical abuse includes the right to be free from certain sexually motivated physical assaults and coerced sexual battery."). In defining the elements necessary for conviction, the judge instructed, not only that defendant's willful sexual assaults had to be "unjustified," but that they also had to amount to "physical abuse" of a "serious" and "substantial" nature, and that, in addition, defendants abuse must involve either "physical force," "mental coercion," "bodily injury" or "emotional damage." J.A. 186-187. It was not necessary for the government to prove, in addition, that the sexual assaults "shocked the conscience" to obtain a conviction. Since rape or sexual assault by a state official can never have a permissible justification, proof of such a rape or a sexual assault involving actual intrusion onto the victim's body ("sexually motivated physical assaults and coerced sexual battery") is always sufficient to establish a deprivation of a right protected by the Due Process Clause.<sup>27</sup>

<sup>27</sup> This case therefore does not involve considerations like those in *Rochin*, where the governmental objective (securing evidence of a crime) was legitimate, but the methods were

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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brutal to the point of "shocking the conscience." Cf. *Breithaupt v. Abram*, 352 U.S. 432, 435-438 (1957) (compelled blood test does not violate due process); *Johnson v. Glick*, 481 F.2d at 1033. Language similar to "shock the conscience" is used in other criminal law contexts to identify sanctionable conduct. For example, the basic Fourth Amendment inquiry in cases charging police officers with excessive force is whether the officers acted with objective reasonableness under the circumstances. *Graham v. Connor*, 490 U.S. at 395-397. Juries in such cases prosecuted under Section 242 must distinguish "reasonable" from "unreasonable" force. See also *Hudson v. McMillian*, 503 U.S. 1, 8-10 (1992) (objective component of Eighth Amendment inquiry must look to "contemporary standards of decency," and use of force must not be "of a sort 'repugnant to the conscience of mankind'"); *United States Gypsum*, 438 U.S. at 438-443 (antitrust laws may form basis of criminal violations despite "indeterminacy of the Sherman Act's standards"); *Miller v. California*, 413 U.S. 15, 30-33 (1973) (obscenity may be punished only if jury finds it violates "contemporary standards of decency").

## COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether a state judge acts "under color of law" and engages in state action when he commits spontaneous sexual assaults, in his office, on employees, applicants for employment and co-workers.

2. Whether a state judge commits intended violations of "specific constitutional provisions", "specifically defined by case law", within the meaning of *Screws v. United States*, 325 U.S. 91 (1945), when he commits non-custodial sexual assaults upon employees, applicants for employment and co-workers, which the jury finds "shocking to the conscience".

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## STATEMENT OF FACTS

The Respondent accepts the government's statement of facts, and supplements it with the following additional statements and observations.

In none of the instances in which the assaults alleged in this case occurred was the Respondent acting or purporting to act in his capacity as a judge. In each instance, his relationship with the woman involved was that of employer/employee, co-government employee or prospective employer. The assaults in each instance were described as spontaneous physical actions that did not purport to be related to the performance of any governmental duty.

Vivian Archie testified that the Respondent had previously granted her a divorce and had awarded her custody of her daughter. (J.A. 47). She testified that she was afraid that her father would file a petition for change of custody and that the Respondent would hear the case and award custody to her father, but she had no case pending before the Respondent at the time the assaults allegedly occurred. (J.A. 49). She testified that she mistakenly believed that the Respondent was the only judge who heard divorce cases in the county, except for "interchanges" in case of conflicts. In fact, the circuit judge had concurrent jurisdiction over divorce cases. (J.A. 59). Sometime after the alleged assaults occurred, Ms. Archie voluntarily surrendered custody of her daughter to her mother. The order transferring custody was not signed by the Respondent, but by the circuit judge. (J.A. 59).

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### SUMMARY OF ARGUMENT

Throughout this case, the government has failed to formulate a coherent and workable definition of the constitutional crimes the Respondent was convicted of. In its argument before this Court, it describes those crimes as violations of "the right to be free from wholly unjustifiable intrusions on bodily integrity" (Govt. Brief p. 35). If adopted, this immensely broad definition of due process violation would have the following effects: 1) as applied to the present case, it would sanction criminal convictions resulting in a total of 25 years imprisonment, based upon the commission of federal crimes that have never previously existed in American jurisprudence; 2) it would reverse *Screws v. United States*, 325 U.S. 91 (1945), which limited the application of 18 U.S.C. § 242 to intended violations of specific constitutional provisions, that have been specifically defined in prior court decisions; 3) it would extend the protection of the Due Process Clause to non-custodial assaults, contrary to recent holdings of this Court; 4) it would exponentially increase the scope of 18 U.S.C. § 242, by making assault and property crimes committed by state officials and employees subject to federal prosecution, without any discernible limitation.

The concept that all "wholly unjustified intrusions on bodily integrity" are due process violations – whenever, wherever and however committed – is a breathtakingly sweeping proposition. Stripped of its rhetorical elegance, the quoted phrase means that all criminal assaults are due process violations, since all criminal assaults "violate physical integrity" and no criminal assault is "justified". This definition of due process violation has no precedent in the case law of this Court or any federal court.

The government is forced to assert this sweeping definition because a narrower definition would not fit the facts of this case. The Respondent's convictions are based on the following facts: 1) he was found to have committed a series of sexual assaults, and 2) he was a judge. If these bare facts are not sufficient to establish due process violations – and they are not – the government cannot prevail in this appeal.

There is a decisive issue in this case that was not addressed in the Court of Appeals' opinion. In the trial court and in the Court of Appeals the Respondent asserted that 18 U.S.C. § 242 does not apply because the evidence does not show that he was acting under color of law when the alleged assaults occurred. A government official acts under color of law when he purports or pretends to exercise his governmental authority; not, as in this case, when he commits purely personal acts. *Screws v. United States*, 325 U.S. 91 (1945). It cannot seriously be asserted that the acts for which the Respondent was convicted were purported or pretended exercises of judicial authority.

In the court below, the government argued that, notwithstanding that the assaults were purely personal, obviously non-judicial acts, the Respondent acted under color of law because his position as a judge had an extortive or intimidating effect upon the women he assaulted. This is a clearly inappropriate and unprecedented application of the color of law requirement, the application of which depends upon the official or private quality of the defendant's acts, not upon his official status. *Screws v. United States*, *supra*; *Polk County v. Dodson*, 454 U.S. 312 (1981) (A state-employed public defender's

representation of clients too closely resembled the conduct of a private lawyer to constitute actions committed under color of law).

The color of law argument is crucial to this appeal, not only because it is outcome determinative in itself, but also because it places the due process argument in the proper context. The due process implications of an assault can be understood only if the governmental context in which the assault occurs is considered. The "color of law" under which the assault takes place must be known in order to determine whether a due process violation has taken place. An assault by a policeman who is purporting to do his duty may be a due process violation, whereas an assault by a judge whose duties do not include the use of force does not. The government's color of law and due process arguments fail for the same reason: the alleged assaults in this case did not occur in the context of any legal process.

The government devotes much of its argument to attacking the Court of Appeals' conclusion that a due process violation must be specifically defined by prior Supreme Court case law before it can be prosecuted. It is argued that this criterion is too strict because: 1) it unrealistically requires a prior case "on all fours" with the prosecuted case, and 2) it requires Supreme Court precedent. The Court of Appeals' criterion is an appropriate reading of the *Screws* opinion, but the government's precedential problems are much broader and deeper than its argument in opposition to that criterion would suggest:

1) The *Screws* decision not only required that criminal due process violations be defined by a factually similar precedent, it required that such violations be based upon specific constitutional provisions, rather than ongoing judicial interpretations of broad "life, liberty and property" due process interests, such as the government relies on in this case.

2) The *Screws* opinion expressly rejected the definition of due process violation the government proposes in this case. The Court refused to adopt the argument made by Justice Murphy in a dissenting opinion that the deprivation of "life" was a *per se* due process crime, stating: "the fact that a prisoner is assaulted or even murdered by a state official does not necessarily mean that he has been deprived of any rights secured by the Constitution . . ." 325 U.S. at 108, 109. In the present case, the government argues that the bare fact that a state official assaults a citizen *does* mean that a due process violation has occurred.

3) This Court has held that non-custodial assaults do not violate due process rights, because an incarceration, institutionalization, or other similar restraint of liberty is necessary in order to trigger the due process liberty interest. *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1984); c.f., *Ingraham v. Wright*, 430 U.S. 651 (1977), discussed on pp. 24-27, *infra*.

4) Lower federal court decisions holding that assaults violated due process rights have involved assaults committed on prisoners, arrestees, detainees and students, who were within the legitimate care or custody of the state when the assaults occurred. There is no lower

court precedent other than the panel decision in the present case, clearly holding that a non-custodial assault can constitute a violation of due process.

5) Several lower federal court decisions have held that non-custodial assaults do not violate due process rights, and in doing so, have relied upon the above Supreme Court precedents. See pp. 27-28, *infra*.

Thus, the government's extended argument regarding the alleged over-strictness of the Court of Appeals' criterion is essentially a red herring. Not only is there no Supreme Court authority "on all fours" with the present case that finds a due process violation: 1) there is no judicial authority of any kind that supports the government's assertion that physical assaults are *per se* due process violations, whenever, wherever and under whatever pretext they occur, and 2) there is abundant authority holding that non-custodial assaults do not, and cannot, violate due process. The government has essentially invented a federal crime to fit the facts of this case.

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## ARGUMENT

### I.

**These Non-custodial Assaults Were Not Committed Under Color Of Law And Did Not Constitute State Action.**

The government has contended that the Respondent committed these alleged assaults "under color of law" and that they constituted state action, because the women were intimidated by the Respondent's status as a judge,

either fearful of what he might do to them in retaliation if they resisted or convinced that no action would be taken against him if they complained to authorities. The theory, in other words, is that the Respondent acted under color of law because his position as a judge assisted him in the commission of these flagrantly non-judicial actions.

This is a radical misapplication of the color of law/state action requirement. The decisions of this and other federal courts make it clear that "under color of law" refers to the defendant's official actions, not to his official status. The requirement is not met by evidence that the defendant had, or even exploited, an advantage derived from his position as a governmental official, as a means of committing private, unofficial acts. The acts themselves must have the aura, or "color", of governmental action. They must be abuses of governmental power, not purely personal actions which are facilitated by the possession of governmental power. See, *United States v. Screws*, 325 U.S. at 111 (1945) and other decisions cited on pp. 8-10, *infra*.

"Color of" is an old English legal term which is used in a variety of contexts. It means "having the appearance of", as in "color of title". The concept "under color of law [or office]" has been part of English law since the Thirteenth Century.<sup>1</sup> It was adroitly defined in a Sixteenth Century case as abusive official behavior "that carries the mask of virtue". *Dive v. Manningham*, 75 Eng. Rep. 96, 108 (1551). The classic American definition of "action under

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<sup>1</sup> "No officer of the king 'by color of his office' without authority . . . [shall] disseize any of his freehold, nor of anything belonging to his freehold" 3 Ed. I, Ch. 24 (1275).

color of law" was stated, appropriately, in *United States v. Classic*, 313 U.S. 299, 326 (1941): "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of law". A police officer acts under color of law when he misuses his power to arrest and restrain individuals by beating them excessively and vindictively. *United States v. Screws*, 325 U.S. 91, 110 (1945).<sup>2</sup> A judge acts under color of law when he misuses his power to control the composition of grand juries to exclude blacks *Ex Parte Virginia*, 100 U.S. 339, 346 (1880).<sup>3</sup>

An official may act under color of law even though he violates the law, if he acts with the pretence or appearance of carrying out his authorized duties. *Screws v. United States*, *supra*, 325 U.S. at 111 ("It is clear that under 'color' of law means under 'pretense' of law"). The "acts of officers in the ambit of their personal pursuits are [on the other hand] plainly excluded" from prosecutions under Section [242]. *Screws v. United States*, 325 U.S. at 111; *c.f.*, *Polk County v. Dodson*, 454 U.S. 312, 318 (1981) (A

<sup>2</sup> "[T]he defendants were officers of the law who . . . made the assault in order to protect themselves and to keep the prisoner from escaping. That was a duty they had under Georgia law. *United States v. Classic* is, therefore, indistinguishable from this case so far as 'color of law' is concerned. In each, officers of the State were performing official duties; in each the power they were authorized to exercise was misused."

<sup>3</sup> The Court held that the judge's actions were state action, because he was acting *as* a representative of the state, even though he abused his authority: "[A]s he acts in the name of and for the state, and is clothed with the State's power, his act is that of the State."

public defender did not act under color of law when she exercised "her independent professional judgment" as a "personal counselor and advocate", because she was acting on behalf of a private client rather than the state). See also, *Stengel v. Belcher*, 522 F.2d 431, 438 (6th Cir. 1975) ("Acts of officers who undertake to perform their official duties are included [within the statute] whether they hew to the line of their authority or overstep it" but "acts of officers in the ambit of their personal private pursuits fall outside of 42 U.S.C. § 1983"); *Murphy v. Chicago Transit Authority*, 638 F. Supp. 464 (N.D. Ill. 1986) (although the defendants' sexually harassing behavior toward a co-worker was "made possible only because [the defendants] were given certain state authority, namely CTA staff attorney jobs," and occurred "in the course of exercising their authority," their actions did not occur "under color of law", because they "had nothing to do with, and bore no similarity to, the nature of the staff attorney job"); *Delcambre v. Delcambre*, 635 F.2d 407 (5th Cir. 1981) (A police chief charged with assaulting his sister-in-law in the municipal police station while on duty, did not act under color of law because the assault had no relation to the performance of his official duties); *Rogers v. Fuller*, 410 F. Supp. 187 (M.D. N.C. 1976) (Police officers who stole \$35,000 in coins from the plaintiff's home while conducting an authorized search did not act "under color of law," because they did not "misuse their authority by confiscating the coins without justification," but merely stole them).

This Court has emphasized that it is not the defendant's status as a state employee or official when he commits wrongful acts that determines whether they are

committed under color of law, but the nature of the acts themselves. In that regard, the Court has not only distinguished between official and private actions, but between various categories of official action. In *Polk County v. Dodson*, 454 U.S. 312 (1981) a state-employed public defender was sued under § 1983, because of actions she took while representing a criminal client. Even though defending clients was a performance of part of the defendant's duties as a government employee, she was representing private, rather than state, interests when she did so. Thus the particular actions for which she was sued were held not to have been committed under color of law. Even the dissenting opinion of Justice Blackmun acknowledged that "acts committed under color of law" are restricted to "acts committed in the performance of duties". 454 U.S. at 329. (Emphasis added).

Manifestly, a judge who commits sexual assaults is not performing a "function" that has the remotest resemblance to an exercise of judicial duties or power. In arguing the contrary, the government uses the term "power" in a colloquial, non-legal sense. The contention is that the Respondent's status as a judge, and in one case, the prospect that he might in the future make a retaliatory use of his judicial authority, gave him "power" over the women, which assisted in the commission of the assaults. This is an obvious misapplication of the *Classic* definition. "Misuse of power" as used in that and subsequent decisions refers to exercises of official power or authority, not to extortive uses of official positions in the performance of purely personal actions, that bear no resemblance to those which the Respondent is legally authorized to perform. There must be a "pretended" exercise of lawful

authority – a "mask of virtue." See cases cited on pp. 8 & 9, *supra*. The government would have the Court read the statutory phrase "whoever under color of law" commits certain acts to mean "whoever takes advantage of his official position to" commit certain acts. That is not what the words of the statute mean, or have been held to mean.

The government's interpretation would open up a vast field of federal prosecutions never before conceived of. It would make federal crimes out of wrongful actions by state employees and officials whenever the fact of their state employment can be argued to be in any way material to the commission of the actions. A police officer who stole an item from a convenience store in the presence of a clerk, or a tax auditor who beat up someone in a fight, would be subject to federal prosecution if the victims testified that they did not resist because they were intimidated by the defendant's governmental position. These examples do not differ in principle from the present facts. The assertion that a judge acts under color or law and engages in state action when he commits sexual assaults upon employees and co-workers in his office is, in fact, about as far removed from logic and precedent as any application of this statute could be. It makes it a Hobbs Act of a civil rights statute, and creates a cornucopia of potential federal criminal prosecutions.

## II.

**These Non-Custodial Assaults Did Not Violate Due Process Of Law Within The Meaning Of 18 U.S.C. § 242.**

The color of law/state action issue just discussed is integrally related to the due process analysis which follows. The government's color of law and due process arguments suffer from a common weakness: the private, non-process oriented nature of the Respondent's actions. The due process case law does not fit the present facts for the same reason the color of law case law does not. It is impossible to find a due process concept that applies to the use of force by an official whose lawful authority does not include the use of force. A policeman who engages in excessive force abuses a lawful custodial process, but a judge who does so is not operating within the ambit of the law at all. The present Respondent did not violate due process, essentially because he did not purport to be engaged in the administration of legal process when he committed these alleged assaults.<sup>4</sup> That simple proposition is at the core of the arguments which follow.

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<sup>4</sup> This argument does not ignore the existence of substantive due process rights (i.e., governmental action that is fundamentally unfair, regardless of the process by which it is administered). It merely notes that the use of violence unrelated to legal custody, or any other legal process, fits no known concept of due process violation, substantive or procedural. See, *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. at 200 ("In the substantive due process analysis, it is the state's affirmative act of restraining the individual's freedom to act on his own behalf through incarceration, institutionalization or other similar restriction of personal liberty which is the 'deprivation of liberty' triggering the due process clause").

**1. The Vagueness and Open-endedness of the Due Process Concept.**

"Due process of law" is the oldest of our constitutional concepts<sup>5</sup> and probably the most difficult to define. The traditional judicial approach has been to interpret "due process" broadly, as including "that which is implicit in the concept of ordered liberty", "fundamental standards of decency in the administration of justice" and like generalities, which judges give specific content to on a case-by-case basis.<sup>6</sup> An alternative view, personified principally by Justice Black, holds that such broad prescriptions inappropriately give judges "boundless power . . . periodically to expand and contract constitutional standards to conform to the Court's conception of what at a particular time constitutes 'civilized decency and fundamental liberty and justice.'" The Black "incorporation theory" asserts that due process should be interpreted as synonymous with the Bill of Rights provisions of the first eight amendments to the Constitution.<sup>7</sup> Only by such a

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<sup>5</sup> Due process of law is the one modern constitutional concept whose origin can legitimately be traced to Magna Charta: "No free man shall be taken or disseized or exiled or in any way destroyed, nor will we go upon him, nor send upon him, except . . . by the law of the land." Magna Charta, chapter 39.

<sup>6</sup> E.g., *Twining v. New Jersey*, 211 U.S. 78, 101 (1908) ("[T]hose fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of law . . . and guard [the citizen] against the arbitrary action of government"); *Palko v. Connecticut*, 302 U.S. 319, 326 (1937) (That which is "implicit in a scheme of ordered liberty").

<sup>7</sup> "My study of the historical events that culminated in the Fourteenth Amendment, and the expressions of those who

construction, it is argued, can applications of the due process clause be kept within proper bounds of judicial discretion. *Adamson v. California*, 332 U.S. 46, 69, *et seq.* (1946) (Dissenting opinion of Justice Black).

While never adopting the incorporation theory as such, this Court has "been reluctant to expand the concept of substantive due process, because the guideposts for responsible decision-making in this uncharted area are scarce and open-ended." *Collins v. Harker Heights*, 503 U.S. 115, 125, 117 L. Ed. 2d 261, 273 (1992); *Albright v. Oliver*, 510 U.S. 266, 127 L. Ed. 2d 114, 122 (1994). Notwithstanding this reluctance, the currently prevailing approach to due process adjudication involves a "complex interplay of the Constitution, statutes and the facts" of each decided case, which makes the contours of due process elusive and difficult to predict from case to case. See, *Parratt v. Taylor*, 451 U.S. 527, 531, 532 (1981). Commentators have called due process jurisprudence a doctrine of "puzzles" which "subsists in

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sponsored and favored, as well as those who opposed its submission and passage, persuades me that one of the chief objects the provisions of the Fourteenth Amendment's first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights applicable to the states." *Adamson v. California*, 332 U.S. at 71 (1946) (Dissenting opinion of Justice Black).

confusion"<sup>8</sup> and have suggested that it often amounts to applying an "unwritten constitution".<sup>9</sup>

## 2. Violation of Due Process as a Crime: *Screws v. United States*.

The vague, open-ended nature of the due process concept makes it a particularly inappropriate standard for defining criminal conduct. A "doctrine of puzzles, subsisting in confusion" is not calculated to give potential defendants constitutionally adequate notice of what conduct is, or is not, criminal. (See, pp. 33-35, *infra*.) A crime that is defined and redefined on an ongoing case-by-case basis presents unique problems of *ex post facto* application and threatens undue judicial encroachment into the legislative domain. (See, pp. 35-40, *infra*.) Moreover, given the complexity of the federal court system, difficult issues of authoritativeness arise when definitions of crimes must be searched for in the case law. The question becomes: when does a category of conduct become a due process violation? When one circuit court of appeals recognizes it as such? When the court in the circuit in which the conduct occurs has recognized it as such? When a majority of circuits have? Or is a definitive holding by this

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<sup>8</sup> Fallon, "Some Confusions about Due Process, Judicial Review and Constitutional Remedies", 93 *Colum. L. Rev.* 309 (1993). See, also, Rubin, "Due Process and the Administrative State", 72 *Cal. L. Rev.* 1044 (1984) (Due process doctrine has experienced a "descent into uncertainty".)

<sup>9</sup> Grey, "Do We Have an Unwritten Constitution?", 27 *Stan. L. Rev.* 703 (1975).

Court required, as the Sixth Circuit Court of Appeals convincingly held in the present case?

The inherent vagueness of the due process concept very nearly led this Court to hold the predecessor to 18 U.S.C. § 242 void for vagueness in its first – and so far only – comprehensive analysis of the statute, in *Screws v. United States*, 325 U.S. 91 (1945). At least seven of the Justices recognized that the traditional case-by-case approach to defining due process could not constitutionally be used to define a criminal offense. The plurality opinion, concurred in by four justices, concluded that the close case-to-case distinctions produced by broad due process definitions would deny constitutionally adequate notice to potential defendants as to the federal criminality of their conduct:

"The treacherous ground on which state officials, police, prosecutors, legislators, and judges would walk (if broad due process definitions were applied) is indicated by the character and closeness of the decisions of this Court interpreting the due process clause of the Fourteenth Amendment."

325 U.S. at 97.

In order to save the constitutionality of the statute, the plurality held that the application of the statute must be confined to violations of specific provisions of the Constitution, specifically defined in the case law, and that an intent to commit such violations must be an element of the offense. The Court concluded that confining prosecutions "to those acts which are clearly marked by the specific provisions of the Constitution as deprivations of Constitutional rights", defined by "definite" case law,

and requiring a "specific intent to effect such deprivations", "saves the Act from any charge of unconstitutionality on grounds of vagueness." 325 U.S. at 103, 105. This holding was, in essence, a narrow application of the Black incorporation theory,<sup>10</sup> later more explicitly stated in his dissenting opinion in *Adamson v. California*, 332 U.S. at 68, *et seq.*

The Court illustrated its notion of the statute's proper application by citing concrete examples, which indicate that in criminal prosecutions the pre-existing definition of the due process violation must be factually specific. A

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<sup>10</sup> The *Screws* opinion's limitation of criminal due process violations to specific constitutional provisions "made definite by decision or rule of law" is suggestive of the Black incorporation theory, but is more restrictive. In illustrating the need for a narrow standard of criminality, the *Screws* opinion lists decisions applying Bill of Rights provisions as "illustrative of the kind of state action which might or might not be caught in the broad reaches of § 20, dependant on the prevailing view of the Court as constituted when the case arose". 325 U.S. at 97. This implies that a prosecution based upon a "specific" Bill of Rights provision would not be appropriate if it adopted an interpretation of that provision not "made definite by judicial decision". When the *Screws* opinion's examples of such overly-vague Bill of Rights violations are read in conjunction with its examples of due process violations which are sufficiently defined for criminal prosecution purposes (see the text of this brief, p. 18) it appears that the Court is limiting criminal prosecutions to violations that are either clearly apparent from the text of the Constitution, or have been announced in authoritative decisions involving facts that are rationally indistinguishable from the facts of the prosecuted case. This, essentially, is what the Court of Appeals held in the present case.

specific intent to violate an "express constitutional provision", made definite by court decision, would be shown, for example, if a local official persisted in enforcing a type of ordinance which the Court had held invalid on First Amendment grounds, or continued to select juries in a manner that "flies in the teeth of decisions of the Court". 325 U.S. at 104. On the other hand, the Court stated – in language directly applicable to the present case – an official's use of excessive physical violence against a citizen would not constitute a *per se* due process violation within the meaning of the statute: "The fact that a prisoner is *assaulted, injured or even murdered by a state official* does not necessarily mean that he is deprived of any rights secured by the Constitution or laws of the United States." 325 U.S. at 108, 109. (Emphasis added). It must be shown that the use of violence was intended to deprive the prisoner, and did deprive him, of specifically defined constitutional protections.

The majority held that the evidence in the *Screws* case was sufficient to establish a due process violation under this standard. The defendant had arrested the victim and had deliberately beaten him to death while in custody, having previously threatened to "get him". This was not only murder, but a deprivation of the prisoner's specific due process right to "a trial in a court of law, not a trial by ordeal. Those who decide to take law into their own hands and act as prosecutor, judge and executioner plainly act to deprive a prisoner of a trial right which due process of law guarantees him." 325 U.S. at 106. Although the evidence established the deprivation of a specifically

defined due process right, the Court reversed the conviction and remanded the case for retrial because the requisite instruction on specific intent, or bad purpose, had not been given.

The dissenters argued that the plurality's cure for vagueness was itself vague. It created a federal criminal common law, they asserted, that was unconstitutional *per se* and would produce unconstitutionally indefinite criminal offenses.<sup>11</sup> The dissenters were proponents of broad readings of the Due Process Clause, but they believed that even the restrictive reading adopted by the plurality was too indefinite for purposes of defining criminal liability.<sup>12</sup> For present purposes, the main significance of the *Screws* opinions is that none of these seven Justices were willing to recognize constitutional crimes based on judicial interpretations of broad due process concepts. It was

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<sup>11</sup> "To base federal prosecutions on the shifting and indeterminate decisions of courts is to sanction prosecutions for crimes based on definitions made by courts. This is tantamount to creating a new body of federal common law.

What the Constitution requires is a definiteness defined by the legislature, not one spelled out through the judicial process which, precisely because it is a process, cannot avoid incompleteness." 325 U.S. at 152, 153.

<sup>12</sup> "What are the criteria by which to determine what express provisions of the Constitution are 'specific' and what provisions are not 'specific'?" And if the terms of § 20 in and of themselves are lacking in sufficient definiteness for a criminal statute, restriction within the framework of "decisions interpreting the Constitution" cannot show the necessary definiteness. 325 U.S. at 150, 151.

a narrow incorporation approach, or no criminal due process law at all.

Subsequent § 242 assault cases have involved assaults upon arrestees, prisoners and other individuals in custody, and are subject to the *Screws* "trial and punishment by ordeal" rationale. This Court has not comprehensively revisited the statute since *Screws*. The Court has, however, come close to adopting an incorporation approach in civil 42 U.S.C. § 1983 cases involving assaults. In *Graham v. Connor*, 490 U.S. 386 (1989), the Court held that all § 1983 claims involving excessive force by law enforcement officers in effecting arrests, stop and search procedures, and other "seizure" procedures were to be confined to a Fourth Amendment analysis, and that all claims asserting the use of excessive force against convicts were to be confined to an Eighth Amendment cruel and unusual punishment analysis. The *Graham* opinion disapproved the "notion" that "there is a generic 'right' to be free from excessive force, grounded not in any particular constitutional provision but rather in 'basic principles of § 1983 jurisprudence' ". 490 U.S. at 393. Even more significantly for present purposes, the Court has elsewhere made it clear that non-custodial assaults cannot be due process violations, by any analysis, because some form of incarceration or institutionalization is required to trigger the liberty interest in "bodily security." *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 200 (1984), discussed on pp. 24-27, *infra*.

**3. The Government's Assertion That The Respondent's Conduct Violated § 242 Is Contrary To The Specificity Requirement Of The *Screws* Decision, And Contrary To Recent Precedent Of This Court Holding That Non-Custodial Assaults Do Not Violate Due Process Rights.**

The assaults that are the subject of this prosecution obviously did not violate any "specific" provision of the Constitution, as required by the holding in *Screws v. United States*. Since none of the women were in custody or otherwise subject to pending legal process, the assaults cannot be considered "seizures" within the meaning of the Fourth Amendment, or "punishments" within the meaning of the Eighth Amendment. Apparently recognizing that fact, the Government asserts a violation of the liberty component of the due process clause itself.

In taking this approach, the government is doing precisely what the *Screws* Court held may not be done. It is attempting to construct a constitutional crime out of judicial interpretations of the due process clause itself, instead of confining § 242 "to those acts which are clearly marked by specific provisions of the Constitution". 325 U.S. at 105. Instead of enforcing a defined criminal offense, it is "referr(ing) the citizen to a comprehensive law library in order to ascertain what acts [are] prohibited." 325 U.S. at 96.

If there is an area of due process jurisprudence that, in the words of the *Screws* opinion, consists of "a large body of changing and uncertain law", it is the ongoing, open-ended definitions that have been given the concept of "liberty". See, *Board of Regents v. Roth*, 408 U.S. 564, 571 (1972) ("Liberty" and "property" are broad, majestic

terms . . . [T]hey relate to the whole domain of social and economic fact. . . ."); *Paul v. Davis*, 424 U.S. 693, 710 (1976) ("It is apparent from our decisions that there exists a variety of interests which are difficult of definition but are nevertheless comprehended within the meaning of either "liberty" or "property" as meant in the due process clause."); *Ingraham v. Wright*, 430 U.S. 651, 673 (1977) ("The contours of this historic liberty interest (in being free from 'unjustified intrusions on personal security') have not been defined precisely."); and *Albright v. Oliver*, 510 U.S. 266 (1994) ("[T]he guideposts for responsible decision-making in this uncharted area [applying substantive due process liberty interest concepts] are scarce and open-ended.").

The government's argument implies a simplistic definitional formula: this Court has held that "bodily integrity" is (in some contexts) a "liberty interest" under the due process clause; physical assaults violate "bodily integrity"; thus, all physical assaults by public officials violate due process and are subject to prosecution under § 242. The high level of generality on which this analysis proceeds makes it essentially meaningless. The hard facts are that: 1) there is no judicial precedent for holding that a non-custodial assault violates § 242; 2) according to the *Screws* decision, a non-custodial assault cannot violate § 242 because it does not violate Fourth Amendment rights, Eighth Amendment rights, or any other right guaranteed by a specific constitutional provision; 3) this Court has held, in a civil context, that assaults that occur when the victim is not subject to the custody and control of the state do not violate his due process liberty interest. (See p. 27, *infra*). Thus, in order to sustain the present

conviction, this Court would be required to overrule the *Screws* holding, apply a broad due process definition to this criminal case, extend that definition, contrary to existing precedent, to a non-custodial assault, and determine that the Respondent is guilty of a constitutional crime that did not exist when he allegedly committed these assaults. Such a ruling would, itself, be a grave deprivation of due process.

Moreover, the breadth of the government's definition of due process violation renders the linchpin of the *Screws* decision – the specific intent requirement – inoperable. The primary means by which the *Screws* decision sought to remedy § 242's vagueness was by requiring proof of an intent to inflict a specific constitutional deprivation. The plurality opinion reasoned that if officials could be convicted only upon proof that they intended to cause specific results that had been declared unconstitutional, the problems of lack of notice, retroactivity and undue federal encroachment upon state law enforcement would be resolved. The Court defined the *Screws* defendants' crime as one of specific intent: assault of a prisoner with the intent of subjecting him to personally administered punishment, *in lieu* of lawfully authorized punishment, and the examples the Court gave of other proper applications of the statute likewise lent themselves to a specific intent requirement (enforcement of a specific type of ordinance, or the selection of a jury by a specific method, previously held unconstitutional).

But the specific intent requirement cannot be applied to the spacious definition of due process violation the government proposes here. "Unjustifiable intrusions upon physical integrity" – a.k.a. criminal assaults – are

inherently crimes of general intent. It was not proven, nor could it have been, that the Respondent had any intent other than a general intent to commit the assaults he was charged with committing. When criminal due process violations are defined as synonymous with criminal assaults, the specific intent requirement necessarily becomes a nullity. However phrased, the court's instruction to the jury will amount to the following: that any assaults committed by the defendant violate § 242 if he intended to commit them. The specific intent requirement will thus dissolve in the generality of the substantive definition of the crime.

At the time these assaults allegedly occurred, there were two Supreme Court decisions that had relevance to their due process implications. *Ingraham v. Wright*, 430 U.S. 651 (1977) and *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1984). Assuming that the *Screws* holding were overruled or disregarded, and assuming that the Court adopted a civil due process standard for defining § 242 violations *in lieu* of the narrow *Screws* standard, these decisions would define the outer perimeters of any criminal liability that could be imposed in this case.

*Ingraham* was an action for injunctive, declaratory and damages relief under 42 U.S.C. § 1981-88, alleging severe injury-producing<sup>13</sup> disciplinary paddlings of two junior high school students. The Court held that civil due

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<sup>13</sup> One of the paddlings was alleged to have caused the student to suffer a hematoma and to have kept him out of school for 11 days, and the other allegedly deprived the student of the full use of his arm for a week.

process violations had not been alleged, because: 1) the Eighth Amendment Cruel and Unusual Punishment Provision applied to those convicted of crimes, not to school children subjected to disciplinary actions; 2) because they were administered while the children were subject to the legitimate control of state authorities, the paddlings implicated the children's non-fundamental liberty interests in "freedom from restraint and punishment", but 3) the availability of adequate state tort remedies to redress violations of those interests precluded any claim that due process had been denied.

The *DeShaney* case was a 1983 damages action brought against a county government, its department of social services and employees of that department, alleging that the defendants had released a four-year-old boy into the custody of his father, knowing that they were subjecting him to a risk of violence, and that the father had subsequently beaten the boy severely. The complaint alleged that the defendants had violated the boy's due process rights by failing to protect him from physical assaults they knew might or would occur. The Court held that no violation of the plaintiff's due process liberty interests had been asserted because the assaults occurred while the plaintiff was in his father's custody.

Neither of these decisions involved the anomalous circumstances of the present case, in which physical assaults committed by a non-custodial official are alleged to have been committed under color of law.<sup>14</sup> The

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<sup>14</sup> None of the prosecuting witnesses in the instant case was within the "custody" or "care" of the Respondent or the state.

*Ingraham* decision indicated, however, and the *DeShaney* decision held, that non-custodial assaults do not implicate due process liberty interests.

The *Ingraham* decision described the violations of the Plaintiff's liberty interests, not as physical assaults, but as custodial punishments. The opinion states that, "while the contours of [the] historic liberty interest [prohibiting unjustified intrusions on personal security] have not been defined precisely, they have been thought to encompass freedom from *bodily restraint and punishment*"; that a liberty interest is implicated "where school authorities, acting under color of state law, deliberately decide to *punish* a child for misconduct by *restraining the child* and inflicting appreciable pain;" and that a "child's liberty interest in avoiding *corporal punishment while under the care of* public school authorities is subject to historical limitations." 430 U.S. 651, 673, 674 and 675. (emphasis added). A fair reading of the *Ingraham* decision is that the Court: 1) declined to extend Eighth Amendment due process protection to school disciplinary actions; but 2) held that such custodial punishments are within the "penumbra" of the cruel and unusual punishment provision of the

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They were all employees, applicants for employment or co-employees of the Respondent. Such relationships do not trigger the liberty interest found to have been violated in the *Ingraham* case. *Collins v. Harker Heights*, 503 U.S. 115, 127, 128 (1992) ("The 'process' that the Constitution guarantees in connection with any deprivation of liberty thus includes a continuing obligation to satisfy a certain minimal custodial standard. See, *DeShaney*, 489 U.S. at 200 . . . Petitioner cannot maintain, however, that the city deprived Collins of his liberty when it made, and he voluntarily accepted, an offer of employment").

Eighth Amendment, and therefore implicated nonfundamental due process liberty interests;<sup>15</sup> and 3) provided no rationale for extending the contours of those liberty interests beyond custodial punishment.

The *DeShaney* Court held that the plaintiff's liberty interests were not implicated because his father's assaults on him did not occur while he was in state custody. The case is distinguishable from the present case only in that the individual defendants were accused, not of assaulting the plaintiff, but of failing to protect him from assaults they knew, or had reason to know, would occur. The Court held that the state had a due process duty to prevent injury from assault only to individuals who are in state custody when the assault occurs:

In the substantive due process analysis, it is the state's affirmative act of restraining the individual's freedom to act on his own behalf through incarceration, institutionalization, or other similar restriction of personal liberty which is "the deprivation of liberty" triggering the due process clause, not its failure to act to protect his liberty interests against harm inflicted by other means.

489 U.S. at 200.

Circuit court decisions have adhered to a custodial/non-custodial analysis in determining whether physical assaults and other injuries implicate due process liberty

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<sup>15</sup> C.f., *Griswald v. Connecticut*, 381 U.S. 479, 484 (1965) "[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance").

interests. E.g., *Benavides v. Santos*, 883 F.2d 385 (5th Cir. 1989) (A jail guard injured during an escape attempt, allegedly because of the "callous indifference of jail officials", did not state a due process claim, although a similarly injured inmate might have done so, because the guard was not in custody when the injuries occurred); *Piechowicz v. United States*, 885 F.2d 1207 (4th Cir. 1989) (Government witnesses murdered by a contract killer who was hired by the individual against whom they testified, were not deprived of due process by the government's placing them in danger and failing to protect them, because due process duties "arise from limitations the states impose on the liberty of persons involuntarily in state custody . . ."); *Hillard v. City and County of Denver*, 930 F.2d 1516 (10th Cir. 1991) (A passenger abandoned in an impounded car by police and subsequently robbed was not deprived of a due process liberty interest because she was not in custody when the robbery occurred.) Anticipating the *DeShaney* holding, the *Hillard* court observed that the due process liberty interest identified in *Ingraham* might extend only to custodial assaults:

The existence of a constitutional right to personal security as recognized in *Ingraham* may well depend on this element of legitimate state power over the individual.

930 F.2d at 1520.

*DeShaney* makes it clear that the due process liberty interest recognized in *Ingraham* does, indeed, depend upon the existence of legitimate state custody or control over the assaulted individual, and resolves the central issue in the present case. If due process protection is not "triggered" unless the injured party is institutionalized or

held in custody when it occurs, non-custodial assaults cannot violate due process rights under any circumstances.

**4. The Requirement That A Non-Custodial Assault "Shock The Conscience" Of The Jury Does Not Qualify It As A Due Process Violation, And Does Not Sufficiently Define It As A Criminal Offense.**

The government contended in the courts below that requiring the jury to find these non-custodial assaults "shocking to the conscience" sufficiently defined them as due process violations.<sup>16</sup> Using a "shocks the conscience" test to define a category of criminal due process violations is, again, precisely the methodology the *Screws* holding rejected. Indeed, in discussing the uncertainty produced by nebulous due process language, the *Screws* Court referred to very similar due process terminology: "That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in light of other considerations, fall short of such denial." 325 U.S. at 95. It is as clear as the English language can make it that "assault by a public official which shocks the conscience" is not a proper definition of a criminal due process violation according to the holding in *Screws*.

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<sup>16</sup> The present contention of the Solicitor General appears to be that the "shocks the conscience" requirement is a non-essential bonus for the Respondent, which gives the due process violations of which the Respondent was convicted more definition than is required.

Nor does it even describe a civil due process violation, according to contemporary Supreme Court case law. As noted, only custodial assaults have been held to violate due process liberty interests, and such assaults are subject to Fourth and Eight Amendment analysis, rather than a broad "shocks the conscience" analysis. *Graham v. Connor*, 490 U.S. 386 (1989). If there is any room left for generalized due process criteria in assault cases, it is difficult to find it in the current Supreme Court decisions.

Moreover, "shocking to the conscience" has never been employed as a jury standard, as it was in this case. Even those who have advocated it as a judicial standard, and have denied that it confers "boundless" illicit power upon judges, have never suggested that juries may be permitted to employ it to factually identify violations of due process. The originator of the phrase, Justice Felix Frankfurter, always qualified his advocacy of this and other general due process standards by emphasizing that they must be applied by judges, in accordance with the most exacting tenets of judicial decision-making.

He first used it in *Rochin v. California*, 342 U.S. 165 (1952) to describe the conduct of police officers who had obtained evidence in a drug case by forcibly pumping a suspect's stomach. In concluding that this was a due process violation, Frankfurter's majority opinion stated:

This is conduct that shocks the conscience . . . It has long since ceased to be true that due process of law is heedless of the means by which otherwise relevant and credible evidence is obtained . . . Due process of law, as a historic and generative principle, precludes defining and thereby

confining these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend a "sense of justice."

342 U.S. at 172.

In response to Justice Black's protest that this methodology was too "nebulous", Frankfurter stated that:

The vague contours of the due process clause do not leave judges at large. We may not draw on our merely personal notions and disregard the limits that bind judges in their judicial functions. Even though the concept of due process of law is not final and fixed, these limits are derived from considerations that are fused in the whole nature of our judicial process . . . These are considerations rooted in reason and in the compelling traditions of the legal profession."

342 U.S. at 170.

Frankfurter had previously conceded in the *Screws* case that the "vague contours" of due process made it an inappropriate standard for defining criminal conduct, even when interpreted by disciplined, knowledgeable judges. Plucking the "shocks the conscience" language from the *Rochin* opinion, and using it as a jury standard in a criminal case, as was done in the trial of this case, ignores the intent of a carefully written opinion and does disservice to the Court's precedents.

Frankfurter's description of the judicial deliberations that must occur in identifying a due process violation becomes grotesque when applied to jury deliberations. Most jurors can bring little to this judge-like task other

than their "merely personal notions". The average juror knows nothing about the "limits . . . derived from considerations that are fused in the whole nature of our judicial process . . . [and are] deeply rooted in reason and in compelling traditions of the legal profession". With the best intent, jurors will necessarily apply a "shock the conscience" standard by deciding whether they are personally and subjectively shocked by what they have heard in court. Thus, constitutional crimes will be defined, not only on a case-by-case basis, but in accordance with the emotional reactions of individual jurors. Law so defined is no law at all.

##### 5. General and Specific Effects of Affirming the Respondent's Conviction.

This case was effectively a state prosecution conducted in federal court. The government charged the Respondent with, and convicted him of, sexual harassments and assaults that would have been punishable under the Tennessee Criminal Code. The evidence presented did not differ from that which would have been presented in a state trial. No criminal intent was proven other than a general intent to commit the assaults. None of the women were in custody or otherwise subject to governmental process when the assaults allegedly occurred.

The only factor introduced into the trial that made even a pretense of distinguishing it from a state prosecution was the requirement that the jurors find that their consciences were shocked by the Respondent's conduct. Presumably shocked by all of it – from unconsented

touchings to serious assaults – they found the Respondent guilty of seven violations of the Constitution. Nothing like it has ever before occurred in an American courtroom.

This prosecution and conviction violate several basic tenets of our constitutional criminal justice system, including the following.

##### A. Reasonable Notice Of Crimes.

Clarity in defining crimes is the essence of due process. As early as 1399, King Henry IV warned Parliament against vague criminal laws, under which "no man knew, as he ought to know, how to do, say or speak, for doubt of the pains of treason". For centuries, English courts oppressed citizens by administering a nebulous offense called constructive treason, which was judicially invented and reinvented to fit the facts of individual cases.<sup>17</sup> One of the landmarks of due process in this Country was Chief Justice Marshall's ruling in Aaron Burr's 1807 treason trial, declaring constructive treason prosecutions unconstitutional. *United States v. Burr*, 8 U.S. 470, 4 (Cranch) 469 (1807).

The Supreme Court has consistently recognized the great dangers posed by vague criminal laws. The most

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<sup>17</sup> Constructive treason in 17th and 18th Century England has been described as "anything whatever which, under any circumstances, may possibly have a tendency, however remote, to expose the King to personal danger or to forcible deprivation of part of the authority incidental to his office." II Stephen, "History of the English Criminal Law" (MacMillan, 1880) p. 268.

obvious, as Henry IV noted, is lack of reasonable notice to potential defendants. When the contours of the criminal law are not clearly communicated, obedience becomes an unreasonable expectation and the rule of law breaks down.

This Court has repeatedly stated that "no one can be required at peril of his life, liberty or property to speculate as to the meaning of penal statutes." E.g., *Lenzetta v. New Jersey*, 306 U.S. 451, 453 (1939). In the *Lenzetta* case, the Court held that using the term "gangster" as part of a definition of a criminal offense deprived potential defendants of constitutionally adequate notice of the prohibited conduct. See also, *Dunn v. United States*, 442 U.S. 100 (1979) (Holding that the phrase "ancillary to grand jury proceedings" in a criminal perjury statute must be narrowly construed in order to avoid unconstitutional vagueness in its application); *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966) (Holding void for vagueness a statute providing that the jury "shall determine by their verdict . . . whether the defendant shall pay costs"); and *Rabeck v. New York*, 391 U.S. 462 (1968) (Holding void for vagueness a statute prohibiting the sale of magazines "which would appeal to the lust of persons under the age of 18").

The federal crimes for which the present Respondent was prosecuted and convicted are at least as vaguely defined, and their application as hard to predict, as the crimes and constructions invalidated in the above decisions. Moreover, this prosecution created a never previously identified constitutional crime – non-custodial assault by a public official, which "shocks the conscience" – that contradicted or exceeded the scope of the holdings of all relevant Supreme Court and lower federal court

precedents. To find parallels for such a prosecution, it would be necessary to go back to the English constructive treason cases. Not only did the Respondent have no way to know, "as he ought to know", that his conduct was punishable as a federal crime, he had every reason to assume the opposite.

#### B. Judicial Encroachment upon a Legislative Function.

If the government's theory in this case were adopted, a vast field of federal criminal common law would be created. Section 242 would become an "undifferentiated font" of federal criminal law, defined – to the extent it was defined at all – by state criminal assault laws involving physical security and property interests. Federal courts would create federal crimes out of state crimes on a case-by-case basis with no congressional authority for doing so.

The precedents of this Court prohibit such unwarranted judicial encroachments upon legislative authority. *United States v. Wiltberger*, 18 U.S. 76, 95 (1820) (Marshall, C.J.) ("It is the legislature, not the court, which is to define a crime, and ordain its punishment"); *Paul v. Davis*, 424 U.S. 693, 701 (1976) (The broad language of the federal civil rights statutes cannot be employed as a judicial "font" of state law, for the creation of federal remedies never contemplated by the legislature.); *Screws v. United States*, 325 U.S. 91, 152, 153 (1945, dissenting opinion) ("[C]rimes must be defined by the legislature. The legislature does not meet this requirement by issuing a blank check to courts for their retrospective finding that some

act done in the past comes within the contingencies and conflicts that inhere in ascertaining the content of the Fourteenth Amendment by the gradual process of judicial inclusion and exclusion").

### C. Encroachment Of Federal Law Enforcement Authority Upon State Law Enforcement Authority.

The *Screws* decision noted that a narrow definition of criminal due process violations was desirable, not only because it provided fair notice to defendants, but also because it maintained a proper balance between state and federal law enforcement. 325 U.S. at 108, 109.<sup>18</sup> Avoidance of undue federal encroachment upon state law enforcement authority has been a consistently expressed concern of this Court in interpreting federal statutes, to the extent that it has attained the status of a rule of statutory construction. See, e.g., *Rewis v. United States*, 401 U.S. 808, 812 (1971) (Adopting a narrow interpretation of the Travel Act, in part because a broad interpretation "would alter sensitive federal-state relationships, could overextend limited federal police resources, and might well produce situations in which . . . relatively minor state offenses [were transformed into] federal felonies"); and *United States v. Bass*, 404 U.S. 336, 350 (1971) (Adopting a narrow interpretation of a federal gun control statute (18 U.S.C.

<sup>18</sup> "We agree that when this statute is applied to the action of state officials, it should be construed so as to respect the proper balance between the states and the federal government in law enforcement . . . Under our federal system the administration of criminal justice rests with the states except as Congress, acting within the scope of those delegated powers, has created offenses against the United States."

§ 1202(a)) in part because "the broad construction urged by the Government renders traditional local criminal conduct a matter for federal enforcement and would also involve a substantial extension of federal police resources").

This Court has similarly declined to adopt expansive interpretations of the due process liberty interest protected by § 1983, on the ground that doing so would convert large segments of state tort law into federal causes of action. E.g., *Paul v. Davis*, 424 U.S. 693, 700, 701 (1976). (A broad reading of the civil due process liberty interest, so as to include all state conduct that defames a citizen, "would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may be administered by the state."); *Parratt v. Taylor*, 451 U.S. 527, 544 (1981) (Interpreting § 1983 to apply to all unjustified takings of property "would almost necessarily result in turning every alleged injury which may have been inflicted by a state official 'acting under color of law' into a violation of . . . § 1983. It is hard to perceive any logical stopping place to such a line of reasoning"). Similarly, treating as due process violations all physical assaults by public officials which a judge or jury finds "shocking to the conscience" would render the Fourteenth Amendment a "font" of criminal law "to be superimposed upon whatever systems may be administered by the state".

The facts of the present case exemplify the problem. The Respondent was charged with a wide spectrum of misconduct, ranging from unconsented to touchings to oral rape. Obviously, the jury found all of these alleged

actions "shocking to the conscience". If all of them violated due process, or were capable of being found to have done so, what form of physical assault would not? And if some of them would not, at what point and on what basis can a line be drawn separating those which are merely state law offenses from those which violate due process of law. "To accept [the government's] argument that the conduct of the state official in this case constituted a violation of the Fourteenth Amendment would almost necessarily result in turning every alleged injury which may have been inflicted by a state official into a violation of the Fourteenth Amendment cognizable [under § 242]". See, 451 U.S. at 544. It would create a federal criminal common law applicable to the conduct of state officials and employees, virtually coextensive with the criminal laws of the 50 states. It is impossible to believe that the "drafters of the Fourteenth Amendment intended the Amendment to play such a role in our society". *Ibid.*

#### D. The Ex Post Facto Effect of Applying An Evolving Due Process Standard.

If the Respondent had been convicted of violating a federal criminal statute enacted after the assaults alleged in this case occurred, his conviction would obviously be a nullity under the *ex post facto* clause (Art. I, § 9) of the Constitution. The application of a judicially-created "non-custodial assault which shocks the conscience" standard to the facts of this case has an indistinguishable *ex post facto* effect. On the day the Respondent was indicted, it was clear, according to the *Screws* opinion, that assaults by state actors violated § 242 only if they occurred while

the victim was in custody and arguably deprived of specific constitutional rights under the Fourth, Fifth, Sixth or Eighth Amendments. Whatever the merits of the prosecutive theory asserted in this case – and they seem to be few – that theory is indisputably contrary to the *Screws* and *DeShaney* holdings, and had never been previously adopted by any court. Accepting that theory now and using it to justify convicting and sentencing the Respondent to 25 years in a federal penitentiary would be a gross violation of the *ex post facto* principle.

The prevention of retroactive application of evolving due process definitions was another reason the *Screws* decision confined § 242 prosecution to violations of specific constitutional provisions, specifically defined by court decisions. Theoretically, the Court noted, a person "commits a federal offense for which he can be sent to the penitentiary if he does an act which some court later holds deprives a person of due process of law." 325 U.S. at 97. It was in part to avoid such unfairness that the Court adopted a construction which permitted prosecutions only if the constitutional rights violated "had been made specific and definite" before the defendant's actions occurred. 325 U.S. at 105.

This Court has declined to give *ex post facto* effect to broad judicial interpretations of criminal statutes rendered after a defendant's allegedly criminal conduct occurred. E.g., *Marks v. United States*, 430 U.S. 188 (1977) (The defendants could not constitutionally be convicted of violating standards of obscenity announced in a Supreme Court decision rendered after the commission of the offenses with which they were charged, which materially enlarged the definition of criminal obscenity); *Bouie*

*v. Columbia*, 378 U.S. 347 (1964) (Prosecuting the defendant for trespass because he remained on premises after receiving notice to leave gave an impermissible *ex post facto* interpretation to a statute prohibiting unauthorized entries onto premises, notwithstanding that the defendant's conduct came within South Carolina's common law definition of trespass.) Even if the Court believed that the revolutionary expansion of federal law enforcement authority contended for here was otherwise a good idea, it would be brutally unfair and contrary to fundamental constitutional principle to make the present Respondent an object of that revolution.

**E. Conferring Over-broad Prosecutive Discretion Through An Over-broad Definition of Criminality.**

An "assault which shocks the conscience" standard of due process is also fundamentally unfair because it allows prosecutors to define crimes and select defendants nearly at will. It provides prosecutive discretion so broad as to be virtually legislative in scope, and undermines the rule of law at the point of application. One can image a federal prosecutor – either with or without personal or political axes to grind – deciding that the spectrum of harassments and assaults attributed to the Respondent in this case either are, or are not, "shocking to the conscience". He might decide, as the present prosecutor apparently did, that even the most minor of them was "shocking" conduct for a judge, and seek an indictment accordingly. He might, on the other hand, decide that even the most serious of them, while "shocking", were not "shocking to the conscience" in the "Frankfurter"

sense. The result would be – indeed has been<sup>19</sup> – gross inconsistency and discrimination in selecting defendants for prosecution, and the creation of an exceptionally handy weapon for personal and political retribution. If there were no other reason for rejecting the government's nebulous due process definition, avoidance of undue prosecutive discretion would be a more than sufficient reason for doing so. *C.F., Cox v. Louisiana*, 379 U.S. 559, 579 (1965) (Broad, vague criminal statutes do not "provide for government by clearly defined law, but rather for government by the moment-to-moment opinions of a policeman on his beat".)

**5. The Availability Of Adequate State Criminal And Civil Remedies For the Respondent's "Random and Unauthorized Acts" Is A Bar To This Prosecution.**

This Court has held in a series of cases that injuries to nonfundamental liberty and property interests inflicted by "random, unauthorized" acts of government employees and officials are not § 1983 due process violations if there are adequate state remedies for the injuries. This principle has been applied to deny federal relief to students severely injured by disciplinary paddlings, and prisoners deprived of personal property through the negligent and intentional acts of prison guards. *Ingraham v.*

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<sup>19</sup> Although § 242 and its predecessors have been law for well over 100 years, this is the first prosecution ever brought under it based upon non-custodial assaults by a non-custodial official. Given the number of such assaults that obviously have occurred over that time span, its uniqueness makes this an astoundingly selective prosecution.

*Wright*, 430 U.S. 651 51 L.Ed.2d 711 (1977); *Parratt v. Taylor*, 451 U.S. 527 (1981); and *Hudson v. Palmer*, 468 U.S. 517 (1984).

Even if the due process liberty interest were – *ex post facto* and contrary to precedent – extended to the non-custodial assaults alleged in the present case, this prosecution would be invalid pursuant to the above holdings. The actions for which the Respondent was convicted were certainly “random and unauthorized” and they were subject to fully adequate criminal and civil remedies under Tennessee law, being potentially prosecutable under various sections of the Tennessee Criminal Code<sup>20</sup> and a basis for damage suits under principles of Tennessee tort law.

Although the present case is a criminal prosecution rather than a civil damage suit, it is clearly within the rationale of the above § 1983 decisions. Those decisions in effect apply a procedural due process analysis to violations of nonfundamental substantive due process rights, when the violations are random and therefore unpredictable. Their unpredictability renders pre-deprivation state remedies impossible, and it is therefore held that post deprivation state remedies satisfy the requirements of due process, if they are comparable to the corresponding federal remedies.

<sup>20</sup> The conduct alleged in this case is potentially prosecutable under Tennessee law, as assault (T.C.A. 39-13-101); aggravated assault (T.C.A. 39-13-102); aggravated rape (T.C.A. 39-13-502); rape (T.C.A. 39-13-503); aggravated sexual battery (T.C.A. 39-13-504) and sexual battery (T.C.A. 39-13-505).

The actions for which the present Respondent was prosecuted were at least as random and unpredictable as those for which the *Ingraham*, *Parrat* and *Hudson* defendants were sued, and the Tennessee state remedies are comparable to the remedies provided by federal law. If the actions of the state officials in the *Ingraham* case did not deprive the students they injured of due process of law, the actions of the present Respondent did not do so either.

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## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Sixth Circuit Court of Appeals should be affirmed, and that judgment should be entered in favor of the Respondent.

Respectfully submitted,

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No. 95-1717

**In the Supreme Court of the United States**

OCTOBER TERM, 1996

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UNITED STATES OF AMERICA, PETITIONER

v.

DAVID W. LANIER

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ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

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REPLY BRIEF FOR THE UNITED STATES

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WALTER DELLINGER  
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## In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 95-1717

UNITED STATES OF AMERICA, PETITIONER

*v.*

DAVID W. LANIER

ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

### REPLY BRIEF FOR THE UNITED STATES

1. Respondent acknowledges that his forcible sexual assaults of his victims took place while he was exercising his official duties as the victims' employer or prospective employer in the judicial system (see Resp. Br. 1). He nonetheless contends that the evidence is insufficient to show that he was acting "under color of law" at the time. That issue was not decided by the en banc court of appeals and is not within the questions presented by the certiorari petition. "While it is true that a respondent may defend a judgment on alternative grounds, [the Court] generally do[es] not address arguments that were not the basis for the decision below." *Matsushita Elec.*

*Indus. Co., Ltd. v. Epstein*, 116 S. Ct. 873, 880 n.5 (1996).

In any event, the contention that respondent did not act under color of law is without merit. As the panel that initially affirmed respondent's convictions observed, there is "considerable objective evidence" (Pet. App. 109a) to support the jury's conclusion that respondent used his power to assault his victims and then to intimidate them into silence (*id.* at 108a). Respondent used his official authority, requiring supervision of and meetings with his victims during the working day, to corner them in his office. He warned his secretary Patty Mahoney that, if she told anyone about the assault, "it would hurt [her] more than it would hurt [him]." J.A. 72. He also told another secretary, Sandy Attaway (whom he had assaulted while wearing his judicial robe, see J.A. 30), that "he was a judge, and everybody should be afraid of him." J.A. 32. He threatened to terminate Vivian Archie's custody of her daughter, in order to assault Archie and then to keep her quiet. J.A. 57-58. With Fonda Bandy, he made clear his intention to misuse his power to provide clients for her parenting program by telling her that he would send her clients if she would come back and see him. J.A. 103. That evidence was sufficient for the jury to conclude that respondent acted under color of law.<sup>1</sup>

<sup>1</sup> It is settled that, in prosecutions under Section 242, whether the defendant acted "under color of law" is a question to be decided by the jury. See *United States v. Tarpley*, 945 F.2d 806, 809 (5th Cir. 1991), cert. denied, 504 U.S. 917 (1992); *Koehler v. United States*, 189 F.2d 711, 713 (5th Cir.), cert. denied, 342 U.S. 852 (1951). The trial court in this case instructed the jury that, to sustain its burden of proof, the government was required to prove beyond a reasonable doubt

Respondent argues that his assaults were not under color of law because (a) they were not actions taken *as a judge* and (b) they were actions taken to satisfy his personal gratification rather than official policy. Both contentions are wide of the mark. First, whether or not respondent was acting in a judicial capacity when he assaulted his victims, he was, at those times, clearly acting as their official employer or prospective employer (see U.S. Br. 5-8),<sup>2</sup> or exercising an official function related to his supervision of the juvenile court (*id.* at 8). This Court has made clear that, "generally, a public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law." *West v. Atkins*, 487 U.S. 42, 50 (1988).<sup>3</sup>

that respondent acted under color of law. J.A. 185. The trial court also defined "under color of law" for the jury, explaining that "[m]isuse of power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law is an action taken under color of state law." J.A. 185-186; cf. *United States v. Classic*, 313 U.S. 299, 326 (1941) (employing same definition); p. 4, *infra*.

<sup>2</sup> "U.S. Br." refers to the government's opening brief in this Court.

<sup>3</sup> The Court has made clear that the "under color of law" element of criminal liability in 18 U.S.C. 242, the "under color of State law" element of civil liability under 42 U.S.C. 1983, and the "state action" requirement of the Fourteenth Amendment all have the same meaning. *West v. Atkins*, 487 U.S. 42, 49 (1988); *Monroe v. Pape*, 365 U.S. 167, 183-187 (1961), overruled in part on other grounds, *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658 (1978).

Respondent relies on *Polk County v. Dodson*, 454 U.S. 312, 325 (1981), for the proposition that a state employee who takes action in the course of performing official duties does not, *ipso facto*, act under color of law. That case, however, involved the

Furthermore, the evidence showed that respondent used his official authority over his victims (as employer, interviewer, or court supervisor), which required meetings with or supervision of the victims in his chambers, to assault them. See U.S. Br. 4-8. "The power which [he was] authorized to exercise was misused," *Screws v. United States*, 325 U.S. 91, 110 (1945) (plurality opinion), and that misuse of power was "made possible only because the wrongdoer [was] clothed with the authority of state law," *United States v. Classic*, 313 U.S. 299, 326 (1941).

Second, it is irrelevant that respondent might have been motivated by personal reasons to assault his victims. Irrespective of respondent's underlying motivations, it is his abuse of his official power to violate his victims' constitutional rights that implicates Congress's concerns in enacting 18 U.S.C. 242 to enforce those rights. The Fourteenth Amendment and Section 242 were both premised on the assumption that "state powers might be abused by those who possessed them and as a result might be used as the instrument for doing wrongs." *Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278, 288 (1913).

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unique situation of a public defender who acts as "the State's adversary" when representing criminal defendants. *Id.* at 322 n.13; see *West v. Atkins*, 487 U.S. at 50. Indeed, in *Polk County*, the Court noted that a public defender does act under color of law when performing other official functions, such as those related to hiring and firing employees. See 454 U.S. at 325 (discussing *Branti v. Finkel*, 445 U.S. 507 (1980)); see also *West*, 487 U.S. at 49-50 (deeming it "firmly established that a defendant in a § 1983 suit acts under color of state law when he abuses the position give to him by the State"). The Court has also stated that "state employment is generally sufficient to render the defendant a state actor." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 n.18 (1982).

The Congress that enacted Section 242 intended that there be a federal remedy for the misuse of state power to abridge federal rights (especially those protected by the Fourteenth Amendment), whether or not that misuse was "authorized" by state law. See *Monroe v. Pape*, 365 U.S. 167, 183 (1961), overruled in part on other grounds, *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658 (1978); *Monroe v. Pape*, 365 U.S. at 196 & n.5 (Harlan, J., concurring).<sup>4</sup>

In this case, therefore, the "under color of law" element turns on the fact that respondent misused his official power to achieve his aims, rather than on the nature of those aims. In concluding that respondent acted under color of law, the court of appeals panel in this case joined other courts of appeals in rejecting the contention that abuse of state power for personal gratification cannot be action under color of law. See *Brown v. Miller*, 631 F.2d 408, 411 (5th Cir. 1980) (concluding that mayor acted under color of state law when he removed city police chief's paychecks to collect debt that police chief owed to mayor's private enterprise, and noting that "it is not significant for purposes of defeating a § 1983 action that the misuse of power under color of state law was motivated solely for purely personal reasons of pecuniary gain"); *United States v. Tarpley*, 945 F.2d 806, 809 (5th Cir.

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<sup>4</sup> In actions brought under 42 U.S.C. 1983, courts of appeals have held that judges were acting under color of state law even when they were engaged in conduct that could not have been undertaken pursuant to their delegated state-law authority. See *Gregory v. Thompson*, 500 F.2d 59, 62 (9th Cir. 1974) (judge assaulted observer in his courtroom); *Harris v. Harvey*, 605 F.2d 330, 337 (7th Cir. 1979) (judge engaged in racially motivated campaign to discredit police lieutenant), cert. denied, 445 U.S. 938 (1980).

1991) (holding that police officer acted under color of law when he assaulted wife's former lover, because, notwithstanding personal nature of his dispute, he "claimed to have special authority for his actions by virtue of his official status"), cert. denied, 504 U.S. 917 (1992); *United States v. Reese*, 2 F.3d 870, 886 (9th Cir. 1993) (rejecting contention that official's action must be intended to "accomplish a governmental objective" to be under color of law, and holding that, "[e]ven if [the officials] were animated by 'purely personal reasons,' [they] would not be immunized from criminal liability under section 242"), cert. denied, 510 U.S. 1094 (1994); *Doe v. Taylor Indep. School Dist.*, 15 F.3d 443, 452 n.4 (5th Cir.) (en banc) (sexual assault by public school teacher is action under color of law), cert. denied, 115 S. Ct. 70 (1994); see *id.* at 461 (Higginbotham, J., concurring) ("manipulative course" of victim's teacher, which "afforded him the opportunity to exert his influence," was an "abuse of power conferred by the state").

Contrary to respondents' contention, this Court did not hold in *Screws* that, if officials act for purely personal reasons, they necessarily fail to act "under color of law." "Rather, *Screws* held simply that individuals pursuing private aims *and not acting by virtue of state authority* are not acting under color of law purely because they are state officials." *Tarpley*, 945 F.2d at 809 (emphasis added; citation omitted). *Screws* did make clear that "acts of officers in the ambit of their personal pursuits are plainly excluded." 325 U.S. at 111. This case, however, does not involve such a situation, for respondent was exercising

official power when he committed the acts that formed the basis of his convictions.<sup>5</sup>

2. On the questions presented in the certiorari petition, respondent makes little effort to defend the en banc court of appeals' central holding, *viz.*, that the violation of a constitutional right may not be prosecuted under Section 242 unless a decision of this Court has previously recognized the application of the right in a fundamentally similar factual situation (see Pet. App. 29a). Rather, respondent argues that (a) Section 242 reaches only violations of constitutional rights protected by specific guarantees of the Bill of Rights, and not violations of the Due Process Clause

<sup>5</sup> Respondent relies on *Delcambre v. Delcambre*, 635 F.2d 407 (5th Cir. 1981), *Rogers v. Fuller*, 410 F. Supp. 187 (M.D.N.C. 1976), and *Murphy v. Chicago Transit Authority*, 638 F. Supp. 464 (N.D. Ill. 1986) (see Resp. Br. 9), but those cases do not suggest a contrary result here. *Delcambre* concluded that a police chief's assault against his sister-in-law at the police station was not action under color of state law, but there was no evidence in that case that the defendant had used his official power in committing the assault. See 635 F.2d at 408. *Rogers*, which held that theft by police officers during the execution of a search was not action under color of state law, has been rejected as "unpersuasive." See *Brown*, 631 F.2d at 411 n.5. *Murphy*, which held that sexual harassment by the plaintiff's co-workers was not action under color of state law, rested on the crucial fact that the harassers had no authority over the victim. See *Woodward v. City of Worland*, 977 F.2d 1392, 1400 (10th Cir. 1992), cert. denied, 509 U.S. 923 (1993). The courts have not suggested that sexual harassment by a supervisor with employment authority would not be action under color of law, even if that supervisor might be said to be acting for personal gratification rather than a governmental purpose. See *id.* at 1400-1401; cf. *Dang Vang v. Vang Xiong X. Toyed*, 944 F.2d 476, 479-480 (9th Cir. 1991) (rape by welfare official was action under color of state law).

itself (Resp. Br. 13-20), and (b) at most, the Due Process Clause protects only persons in custodial situations from assaults by state officials (*id.* at 21-29). Neither contention withstands scrutiny.

a. Respondent argues that, under *Screws*, Section 242 may be applied only to the deprivation of “specifically defined constitutional protections” and not rights based on “judicial interpretations of broad due process concepts” (Resp. Br. 18-19). He contends that *Screws* rejected a reading of Section 242 that reaches violations of the Due Process Clause itself, because the Court was faced with the choice of “a narrow incorporation approach, or no criminal due process law at all.” Resp. Br. 20. That submission is plainly incorrect.

The Court in *Screws* held expressly that public officials may be punished under Section 242 for the violation of the due process rights “made specific” by “decisions interpreting them.” 325 U.S. at 104; see *id.* at 105. The Court has also made clear elsewhere that both Section 242 and its companion conspiracy statute, 18 U.S.C. 241, reach all rights protected by the Constitution and laws of the United States. “Neither [Section] is qualified or limited. Each includes \* \* \* all of the Constitution and laws of the United States.” *United States v. Price*, 383 U.S. 787, 797 (1966).<sup>6</sup> Sections 241 and 242 “dealt with Federal rights and with all Federal rights, and protected them in the lump.” See *United States v. Mosley*, 238 U.S.

<sup>6</sup> Although the Court was once closely divided on the question whether Section 241 reached rights protected by the Fourteenth Amendment, see *United States v. Williams*, 341 U.S. 70 (1951), it has never suggested that Section 242 does not cover all rights protected by the Fourteenth Amendment.

383, 387 (1915) (Holmes, J.). Accordingly, “an offense under § 242 is properly stated by allegations of willful deprivation, under color of law, of life [or] liberty without due process of law,” without more. *Price*, 383 U.S. at 793.<sup>7</sup>

The Court in *Screws* carefully noted that Section 242 protects both rights made specific “by the express terms of the Constitution,” and other rights made specific “by decisions interpreting them,” as (in the latter case), for example, rights protected by the Due Process Clause itself. See 325 U.S. at 104-105. The Court also observed that the Due Process Clause “formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights.” *Id.* at 95. It nonetheless held that, once a due process right has been made specific by court decisions, “a person acting with reference to the statute [has] fair warning that his conduct is within its prohibition.” *Id.* at 104.

It is true that, when the Court in *Screws* sustained the constitutionality of Section 242 as applied to rights protected by the Due Process Clause of the Fourteenth Amendment, it referred to several cases

<sup>7</sup> Respondent notes (Resp. Br. 18) that in *Screws* the Court stated that “[t]he fact that a prisoner is assaulted, injured, or even murdered by state officials does not necessarily mean that he is deprived of any right protected or secured by the Constitution or laws of the United States.” 325 U.S. at 108-109. That language comes from the Court’s discussion of the “under color of law” element of Section 242, not its earlier discussion of rights protected by the Due Process Clause (see 325 U.S. at 94-100). The Court emphasized in that context that the Fourteenth Amendment and Section 242 reach only the abuse of governmental power by officials, not all violations of state law. See 325 U.S. at 108.

that, under more recent analysis, might have been decided as interpretations of specific provisions of the Bill of Rights, as incorporated against the States by the Due Process Clause. See 325 U.S. at 97. That does not mean, however, that the Court adopted what "was, in essence, a narrow application of [Justice Black's] incorporation theory," as respondent suggests (Resp. Br. 17). In fact, some of the cases cited in *Screws* were expressly decided under the Due Process Clause itself, without reliance on or reference to the original Bill of Rights.<sup>8</sup>

*Graham v. Connor*, 490 U.S. 386 (1989), did not alter the rule established by this Court's decisions that both Section 242 and 42 U.S.C. 1983 may be used to vindicate a liberty interest in bodily integrity protected by the Due Process Clause itself. In *Graham*, the Court concluded that, when an "excessive force claim arises in the context of an arrest or investigatory stop of a free citizen," that claim must be analyzed "under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." *Id.* at 394-395. The Court's holding, however, was addressed and limited to the situation where a "more specific constitutional right governed by a different standard" than that of the Due Process Clause bears directly on the facts of

<sup>8</sup> See, e.g., *Powell v. Alabama*, 287 U.S. 45, 60 (1932) (holding that "the denial of the assistance of counsel [in a capital case] contravenes the due process clause of the Fourteenth Amendment"); *Olsen v. Nebraska*, 313 U.S. 236, 243 (1941) (holding that application of state price-control statute does not violate "the due process clause of the Fourteenth Amendment"); *Ashcraft v. Tennessee*, 322 U.S. 143, 145, 154 (1944) (holding that involuntary confession extracted by lengthy questioning violates the Fourteenth Amendment).

the case at hand. *Id.* at 393. Because the use of force may often be justified during arrests, the conduct of police in that situation should not be governed by "a single generic standard," *ibid.*, but by standards developed in light of the specific governmental interest relevant to the Fourth Amendment. The Court did not suggest in *Graham* that persons not being arrested or stopped by police lack any constitutional protection under the Due Process Clause against physically abusive conduct by government officials. See also *id.* at 395 n.10 (reaffirming that "the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment").

b. Respondent argues that "assaults that occur when the victim is not subject to the custody and control of the state do not violate his due process liberty interest." Resp. Br. 22. As support for that proposition, respondent relies heavily (*id.* at 24-27) on *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989). *DeShaney*, however, involved the quite different situation of the State's failure to protect someone from assault by a *private* actor. The Court ruled that the Due Process Clause does not (outside a non-custodial setting) impose affirmative obligations on the State to prevent harm by private actors. The Court stated that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. \* \* \* Its purpose was to protect the people from the State, not to ensure that the State protected them from each other." *Id.* at 195-196. *DeShaney* does not cast any doubt on the settled rule that the Due Process Clause prohibits officials from misusing

their power to engage *themselves* in completely unjustified assaults on citizens.<sup>9</sup>

Respondent's submission that the Due Process Clause protects *only* those in custody from intentional, unjustified assaults by state officials is almost the reverse of the correct view. A custodial situation may create a justification for the use of force that would not exist with respect to a free person; for example, force that would not be justified in a judge's encounter with a free person might be justified in the management of inmates of psychiatric institutions. Thus, when the Court considered, in *Ingraham v. Wright*, 430 U.S. 651 (1977), and *Youngberg v. Romeo*, 457 U.S. 307 (1982), whether school children and psychiatric inmates have a right to personal security protected by the Fourteenth Amendment, the difficulty in those cases was created by the fact that the plaintiffs were under supervision, such that some physical force might be justified in their correction, treatment, or management. As the Court noted in *Ingraham*, the child's liberty interest in avoiding corporal punishment had always been subject to "historical limitations" because of the particular context, and in particular because a teacher was historically deemed justified in giving "moderate correction" to a child. See 430 U.S. at 675. But the Court also made clear that among the "historic liberties" enjoyed by free persons under the common law, and therefore protected by the Due Process Clause, was "a right to be free from \* \* \* unjustified intrusions on personal security." *Id.* at 673. See also *Young-*

<sup>9</sup> The three court of appeals cases following *DeShaney* cited by respondent (Resp. Br. 28) similarly involve the State's failure to prevent harm caused by private actors.

*berg*, 457 U.S. at 315 (concluding that the liberty interest in personal security protected by the Due Process Clause is not "extinguished" by lawful confinement in a psychiatric institution).

3. Respondent suggests (Resp. Br. 22) that "there is no judicial precedent for holding that a non-custodial assault violates [Section] 242." As a factual matter, that assertion is incorrect. See *United States v. Tarpley*, 945 F.2d 806 (5th Cir. 1991) (holding that assault by deputy sheriff on wife's former lover in his own home was under color of law), cert. denied, 504 U.S. 917 (1992). Most reported decisions under Section 242 do involve custodial situations, but that reflects the fact that officials have greater opportunity to engage in assaults using the authority of their office when the victims are in their custody. The Department of Justice has in the past prosecuted several Section 242 cases involving non-custodial situations, including two cases involving sexual assaults by judges that resulted in guilty pleas. See U.S. Br. 19 n.6.

Furthermore, there have long been reported cases arising under 42 U.S.C. 1983 establishing that unjustified assaults by state officials in non-custodial situations violate a liberty interest in bodily integrity protected by the Due Process Clause. See *Gregory v. Thompson*, 500 F.2d 59, 62 (9th Cir. 1974); *Shillingford v. Holmes*, 634 F.2d 263 (5th Cir. 1981); *Wassum v. City of Bellaire*, 861 F.2d 453, 454-455 (5th Cir. 1988); *Dang Vang v. Vang Xiong X. Toyed*, 944 F.2d 476, 479-480 (9th Cir. 1991). And there is "nothing wrong with looking to a civil case brought under 42 U.S.C. § 1983 for guidance as to the nature of the constitutional right whose alleged violation has been made the basis of section 242 charge," for the two

Sections protect "the same constitutional rights." *Reese*, 2 F.3d at 884. Accordingly, respondent cannot claim to have been surprised that his "non-custodial" rapes and assaults violated his victims' constitutional rights.

4. Respondent argues that, for purposes of prosecution under Section 242, a violation of a liberty interest protected by the Due Process Clause cannot depend on whether the jury concludes that the defendant's action "shocks the conscience." Resp. Br. 29. Like the court of appeals, respondent misapprehends the purpose of the trial court's "shocks the conscience" instruction to the jury (to which respondent did not object at trial). The district court viewed the "shocks the conscience" language as an additional safeguard for the respondent. The court used that language in emphasizing that the physical abuse committed by respondent must be "serious [and] substantial" to constitute a violation of the constitutional right to bodily integrity. J.A. 186-187.

As we have explained (U.S. Br. 45-46), it was not necessary for the government to prove in this case that respondent's actions shock the conscience. Because rape and sexual assault by a government official can never have a permissible justification, and because due process requires, at a minimum, that the government have a permissible justification for making an actual physical intrusion onto a person's body (see U.S. Br. 40-41), proof that respondent sexually assaulted his victims willfully and under color of law was sufficient to establish the deprivation of a right protected by the Due Process Clause.<sup>10</sup>

<sup>10</sup> The trial court's jury instructions stated that, "[i]ncluded in the liberty protected by the Fourteenth Amendment is the

5. Respondent argues that our construction of Section 242 would transform all state-law assaults into federal crimes, and would thereby upset the "balance between state and federal law enforcement." Resp. Br. 36. That concern has no relevance, however, in the context of unjustified assaults by a state official acting under color of law—actions that have been recognized to implicate a liberty interest protected by the Due Process Clause. See U.S. Br. 38-45; *Youngberg*, 457 U.S. at 315-316; *Ingraham*, 430 U.S. at 673-674. Application of Section 242 in cases like this one is fully consistent with Congress's objective of "provid[ing] a federal remedy where the state remedy, though adequate in theory, was not available in practice." *Monroe v. Pape*, 365 U.S. at 174.

Respondent also makes the related argument that the sexual assaults cannot constitute due process violations because of the existence of adequate post-deprivation remedies under state law (including the possibility of prosecution under state law). Resp. Br. 36-38. Respondent analogizes this case to *Parratt v. Taylor*, 451 U.S. 527 (1981), where the Court held that, although an inmate had been deprived of a property interest under color of law, that deprivation did not violate due process because there were adequate post-deprivation state-law remedies. That case, however, as well as the others cited by respondent,

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concept of personal bodily integrity and the right to be free from unauthorized and unlawful physical abuse by state intrusion." J.A. 186. The court also instructed that the constitutional right to bodily integrity includes the "right to be free from willful sexual assault." *Ibid.* Thus, the instructions correctly identified the constitutional right that respondent was charged with violating in committing the sexual assaults.

involved claims that official action violated the Due Process Clause's guarantee of fair *procedures*.<sup>11</sup> The Court emphasized in those cases that, as a matter of procedural due process, "the deprivation by state action of a constitutionally protected interest in 'life, liberty, or property' is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law*." *Zinermon v. Burch*, 494 U.S. 113, 125 (1990). Thus, "[t]he constitutional violation actionable \* \* \* is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process." *Id.* at 126.

This case, by contrast, involves the charge that the rapes and sexual assaults themselves deprived the victims of liberty protected by the Due Process Clause. Since "the Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them,'" the "constitutional violation \* \* \* is complete when the wrongful action is taken." *Zinermon*, 494 U.S. at 125. Thus, the *Parratt* doctrine has no bearing on abuse of power that, regardless of procedure, consti-

<sup>11</sup> In *Ingraham*, the Court addressed whether corporal punishment in schools without prior notice or the opportunity to be heard violated procedural due process. The Court held that procedural due process was not violated in that case, but it also expressly held that the case implicated a substantive liberty interest protected by the Due Process Clause. 430 U.S. at 653, 683. In *Hudson v. Palmer*, 468 U.S. 517, 533 (1984), the Court held that intentional deprivations of property do not violate "the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful postdeprivation remedy for the loss is available."

tutes a deprivation of liberty without due process of law. See also *Daniels v. Williams*, 474 U.S. 327, 331-332 (1986) (noting that, "by barring certain government actions regardless of the fairness of the procedures used to implement them," the Due Process Clause "serves to prevent government power from being 'used for purposes of oppression'"). In cases like this one, the conduct that was alleged and proven "would remain unjustified even if it were accompanied by the most stringent of procedural safeguards." *Gilmere v. City of Atlanta*, 774 F.2d 1495, 1500 (11th Cir. 1985) (en banc), cert. denied, 476 U.S. 1115 and 1124 (1986).<sup>12</sup>

\* \* \* \* \*

For the foregoing reasons, and for the reasons set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

WALTER DELLINGER  
Acting Solicitor General

OCTOBER 1996

<sup>12</sup> Furthermore, in the procedural due process cases cited by respondent, the Court pointed to alternative post-deprivation *civil* remedies under state law as indications that the plaintiff was not deprived of procedural due process. The Court has not, to our knowledge, suggested that state-law criminal remedies (brought at the discretion of a prosecutor) could provide an adequate post-deprivation remedy for one deprived of a liberty interest.

Supreme Court, U.S.  
FILED

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(14)  
No. 95-1717

In The  
**Supreme Court of the United States**  
October Term, 1996

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UNITED STATES OF AMERICA,

*Petitioner,*

v.

DAVID W. LANIER,

*Respondent.*

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On Writ Of Certiorari  
To The United States Court Of Appeals  
For The Sixth Circuit

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SUPPLEMENTAL BRIEF

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*Attorneys for the Respondent*

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**SUPPLEMENTAL BRIEF ON BEHALF  
OF THE RESPONDENT**

The Respondent files this supplemental brief to call the Court's attention to a decision rendered by the Sixth Circuit Court of Appeals on September 11, 1996. *Archie v. Lanier*, 95 F.3d 438 (6th Cir. 1996) was an action brought under 42 U.S.C. § 1983, involving some of the assaults that are the subject of the present case. The Respondent had filed a *pro se* appeal from a ruling of the district court rejecting his defense of judicial immunity. The Court of Appeals affirmed, holding that his commission of the assaults could in no way be considered "judicial acts". In reaching this conclusion the Court applied essentially the same standard the Respondent has asserted in his "color of law" and "state action" arguments in the present case. Although the *en banc* Sixth Circuit decision in the present case did not reach the color of law/state action argument, it is evidence that the three members of the Court who joined in the *Archie* opinion would have held that the Respondent's actions were not committed under color of law, and did not constitute state action, had the issue been reached. Pertinent excerpts from the *Archie* opinions follow:

"[W]e look to the particular act's relation to the general function normally performed by a judge" to determine whether the action complained of was indeed a judicial act. Ultimately, it is the "nature" of the function performed, rather than the identity of the person who performed it, that informs a court's immunity analysis.

\* \* \*

We hold that stalking and sexually assaulting a person, no matter the circumstances, do not constitute "judicial acts". The fact that, regrettably, Lanier happened to be a judge when he committed these reprehensible acts is not relevant to the question of whether he is entitled to immunity. Clearly he is not.

95 F.3d at 441.

\* \* \*

In *United States v. Lanier* . . . the criminal analog to this civil case, we held that Lanier's conduct, the same conduct complained of here, does not constitute a federal crime under 18 U.S.C. § 242.

In that case, the government argued that Lanier's sexual assaults were made as a judicial official, "under color of state law," an explicit requirement or element of a § 242 offense. In order for Lanier to be found criminally liable under § 242, "state action" must be present. A § 242 act "under color of state law" must be an act "under pretense of law" for "the acts of officers in the ambit of their personal pursuits are plainly excluded." (Citation omitted.) It must be a "misuse of power . . . made possible only because the wrongdoer is clothed with the authority of the law . . ." (Citation omitted.) The sexual conduct here was singularly "personal" and obviously not "clothed with the authority of law."

\* \* \*

It would seem inconsistent to follow the government and say [in the § 242 case] that Lanier was performing a judicial function under state law for purposes of criminal liability and then turn around and deny Lanier judicial immunity on

the ground that he was not performing a judicial function.

The only consistent, sensible approach in this area of law is to say what seems obvious: Sexual assaults have nothing to do with the appearance of carrying out authorized judicial duties, exercising judicial power or performing the function of judging.

95 F.3d at 443, 444 (Concurring opinion).

The Respondent submits this authority because it throws additional light upon the color of law/state action issue, and tends to refute any implication that the Sixth Circuit majority opinion in the present case implicitly found that the Respondent was acting under color of law or was a state actor.

Respectfully submitted,

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Supreme Court, U. S.

F I L E D

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No. 95-1717

CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1996

UNITED STATES OF AMERICA, PETITIONER

*v.*

DAVID W. LANIER

ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

**SUPPLEMENTAL BRIEF FOR THE PETITIONER**

WALTER DELLINGER  
*Acting Solicitor General*  
*Department of Justice*  
*Washington, D.C. 20530-0001*  
*(202) 514-2217*

47 p/2

**In the Supreme Court of the United States**

OCTOBER TERM, 1996

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No. 95-1717

UNITED STATES OF AMERICA, PETITIONER

*v.*

DAVID W. LANIER

---

ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

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**SUPPLEMENTAL BRIEF FOR THE PETITIONER**

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Pursuant to Rule 25.5 of the Rules of this Court, the Acting Solicitor General respectfully files this supplemental brief to bring to the Court's attention a decision of the United States Court of Appeals for the Sixth Circuit, *Doe v. Claiborne County*, No. 95-5050, 1996 WL 734583, issued on December 26, 1996, after the completion of briefing in this case. App., *infra*, 1a-42a. This decision bears on the question whether, for purposes of 18 U.S.C. 242, the right secured by the Due Process Clause of the Fourteenth Amendment to be free from sexual assault under color of law has been "made specific" within the meaning of *Screws v. United States*, 325 U.S. 91 (1945).

In *Doe*, a high school student alleged that she had been sexually harassed, abused, and assaulted by a

teacher on several occasions between the spring of 1991 and December 1992. The student brought an action under 42 U.S.C. 1983 against the County, the County school board, and several board members and school officials. The district court dismissed her suit on the ground that the defendants could not be held liable for the actions of the teacher, but also found that the right to be free from sexual abuse at the hands of a public school teacher was clearly established. App., *infra*, 11a-12a.

A divided panel of the Sixth Circuit affirmed the dismissal of the Section 1983 suit, but not before addressing "whether the sexual abuse perpetrated against Doe amounts to a constitutional violation." App., *infra*, 16a. In answering this question, the court first cited this Court's decisions establishing a right to bodily integrity, noting that "[t]he right to personal security and to bodily integrity bears an impressive constitutional pedigree." *Id.* at 16a. It then held that this general right to bodily integrity "manifestly embraces the right to be free from sexual abuse at the hands of a public school employee."<sup>1</sup> *Id.* at 18a. In the court's view,

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<sup>1</sup> The court observed that "every court of appeals that has had the opportunity to consider the issue has logically recognized that the right to be free from sexual abuse at the hands of a public school teacher is clearly protected by the Due Process Clause of the Fourteenth Amendment." App., *infra*, 17a-18a (citing *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 726 (3d Cir. 1989), cert. denied, 493 U.S. 1044 (1990); *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 451 (5th Cir.) (en banc), cert. denied, 115 S. Ct. 70 (1994); *Abeyta v. Chama Valley Indep. Sch. Dist.*, 77 F.3d 1253, 1255 (10th Cir. 1996)).

the magnitude of the liberty deprivation that sexual abuse inflicts upon the victim is an abuse of governmental power of the most fundamental sort; it is an unjustified intrusion that strips the very essence of personhood. If the "right to bodily integrity" means anything, it certainly encompasses the right not to be sexually assaulted under color of law. This conduct is so contrary to fundamental notions of liberty and so lacking of any redeeming social value, that no rational individual could believe that sexual abuse by a state actor is constitutionally permissible under the Due Process Clause.

*Id.* at 18a. And although the court ultimately dismissed the Section 1983 suit against the various defendants because they could not be held responsible for the teacher's conduct, it indicated that an action against the teacher would have produced a different result. *Id.* at 29a ("We have already implicitly held that [the teacher] was a state actor and that therefore the constitutional injury occurred under color of law.").

The panel believed that its holding was not in conflict with the en banc court's decision in this case, *United States v. Lanier*, 73 F.3d 1380 (6th Cir. 1996) (Pet. App. 1a-86a), because prior to *Lanier* neither the Sixth Circuit nor this Court had previously "explicitly held" that the right to bodily integrity includes a right to be free of sexual assault. The lack of such a specific decision was thought in *Lanier* to "implicate[] due process limitations, ex post facto considerations, the danger of arbitrary judgments, and a variety of other constitutional concerns." App., *infra*, 19a-20a. Because those concerns are peculiar to the

criminal context, the court found, *Lanier* was not directly at odds with its holding "that Doe had a clearly established right under the substantive component of the Due Process Clause to personal security and to bodily integrity, that such right is fundamental, and that [the teacher's] sexual abuse of Doe violated that right." *Id.* at 20a.<sup>2</sup>

The Sixth Circuit's conclusion that there is a "clearly established" right to bodily integrity that "manifestly embraces" and "certainly encompasses" a right to be free of sexual assault by state actors is in accordance with the decisions of other federal courts that have addressed the question, as we pointed out in our opening brief (at 41-43).

Respectfully submitted.

WALTER DELLINGER  
*Acting Solicitor General*

JANUARY 1997

<sup>2</sup> Judge Norris dissented from the panel's opinion on this point. He believed that the panel's holding was contrary to the en banc court's decision in *Lanier*. App., *infra*, 41a.

# APPENDIX

## UNITED STATES COURT OF APPEALS SIXTH CIRCUIT

No. 95-5050

JANE DOE AND JANET DOE, INDIVIDUALLY,  
PLAINTIFFS-APPELLANTS

v.

CLAIBORNE COUNTY, TENNESSEE, BY AND  
THROUGH THE CLAIBORNE  
COUNTY BOARD OF EDUCATION; AND  
DENNIS L. PETERS; ROY L. NORRIS;  
CHARLES RANDALL BURCHETTE;  
BOBBY WILLIAMS; DR. ROY ELLIS, JR.;  
J.P. BARNARD; LYNN S. BARNARD; IN THEIR  
INDIVIDUAL AND OFFICIAL CAPACITIES; AND SAM  
WIDENER; DON DOBBS, AND  
JAMES LEONARD BUNDREN,  
IN THEIR OFFICIAL CAPACITIES ONLY,  
DEFENDANTS-APPELLEES

ON APPEAL FROM THE UNITED STATES  
DISTRICT COURT FOR THE EASTERN DISTRICT  
OF TENNESSEE

Decided and Filed Dec. 26, 1996

Before: KRUPANSKY, RYAN, and NORRIS, Circuit  
Judges.

RYAN, Circuit Judge:

Plaintiff, Jane Doe, brought this civil rights action under 42 U.S.C. § 1983 against Claiborne County, Tennessee, the Claiborne County Board of Education, and several School Board members and school administrators in both their individual and official capacities. She alleges that she suffered damages as a result of being sexually harassed, abused, and ultimately statutorily raped by a school teacher, Jeffrey Davis, when she was a student. Doe also sued the County and the School Board for sexual harassment, in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-88, and brought a variety of state tort claims.<sup>1</sup>

The district court dismissed Doe's section 1983 claims, concluding that she presented no facts that showed defendants were deliberately indifferent to her constitutional right to bodily integrity. The court excluded Doe's "notice" evidence, which was crucial to her claims. Finally, the court dismissed Doe's Title IX sexual harassment claim against the

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<sup>1</sup> This suit was originally brought by Jane Doe and her mother, Janet Doe. Janet Doe sued the defendants for extreme mental anguish, but her cause of action was dismissed and she has not appealed that decision to this court. Plaintiffs also pled causes of action under the Tennessee Governmental Tort Liability Act, which were dismissed by the United States District Court and the decision has also not been appealed to this court. Davis, too, is no longer a party to this lawsuit. Although he was initially named as a defendant, when the district court dismissed all of Jane Doe's claims against the County, the School Board, and the board members and administrators, plaintiff moved under Fed. R. Civ. P. 41(a)(2) to dismiss Davis from the suit to facilitate this appeal. We shall, hereafter, refer to Jane Doe as Doe.

County and the School Board on the grounds that Title VII agency principles do not apply to Title IX actions, and because Title IX does not reach the County. For the reasons explained below, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

## I.

### A.

#### Factual Background: Jeffrey Davis's Abuse

At the time of the sexual abuse, Jane Doe was fourteen years old and a freshman at Claiborne County High School (CCHS), from which she graduated in 1994. Jeffrey Davis was a physical education teacher and coach at Soldiers Memorial Middle School (SMMS), and was the coach for the CCHS boys' baseball team. Before being hired for this position for the 1990-91 school year, Davis had been employed by the School Board as a boys' physical education teacher and basketball coach at Midway School from 1987 to 1990.

Doe first met Davis during the spring of 1991 when she became a scorekeeper for the boys' baseball team. As a scorekeeper, she was required to travel by bus to the games with the team and the coach, Davis. Davis began systematically abusing and harassing Doe during these bus trips. At the team's first away trip, Doe sat next to Davis, who reached inside her blouse and fondled her breasts. She was "surprised" and "paralyzed" by the incident. She avoided Davis for the rest of the school year.

At the beginning of the 1992 school year, Davis started harassing Doe with telephone calls. He called her and asked her whether she would like to be the scorekeeper at the next boys' basketball game. Al-

though nervous about riding with Davis on the bus once again, she acceded to his request. During the bus trip, Davis fondled her breasts for the second time. Davis then began telephoning Doe at home on a regular basis. He persuaded her to reciprocate the phone calls, but instructed her to call only when Davis's wife would not be home. The telephone conversations continued through the holiday break.

In January 1992, and for reasons not important to this litigation, Doe moved into her aunt's home. Davis persisted in telephoning Doe, increasing the calls to a daily basis. On one occasion, Davis kissed Doe on the mouth in the coaches' office at SMMS. On Valentine's Day 1992, Davis gave her a ring, and later the same month he suggested that they have sexual intercourse. Shortly after this proposal, during another bus trip, Davis touched Doe's vagina through her pants and made her touch his penis, also through his pants. One month later, Davis told Doe that he loved her.

In late March 1992, Davis took Doe to a trailer that belonged to friends of his and had sexual intercourse with her for the first time. This was Doe's first sexual experience and she suffered vaginal bleeding. They had sexual intercourse on five other occasions. Throughout these sexual encounters, Davis and Doe continued their phone conversations, and Davis continued fondling Doe during bus trips.

The systematic sexual abuse of Doe came to an end in December 1992, when two of her aunts discovered her in Davis's home while his wife was away at the hospital giving birth to their child. Prior to that time, she never reported to anyone her ongoing relationship with Davis. Davis was subsequently charged with six counts of statutory rape and he tendered an

Alford<sup>2</sup> plea to one count. Doe has been in psychological counseling since 1993.

## B.

### Defendants' Role

Doe sued Claiborne County "by and through" the Claiborne County Board of Education, Davis, and ten other defendants. She sued the following seven defendants in both their individual and official capacities: Dennis Peters, superintendent of schools until 1990 and principal of CCHS from 1990 to 1992; Roy Norris, superintendent of school from 1990 to 1992; Bobby Williams, Chairman of the School Board; Charles Randall Burchette, Roy Ellis, and J.P. Barnard, members of the School Board; and Lynn Barnard, principal of SMMS. She also sued the following three defendants in their official capacities only: Sam Widener, member of the County Board of Education; Don Dobbs, interim superintendent of schools; and James Bundren, principal of Midway School.

Bundren was the principal of Midway School when Davis was first accused of misconduct. In the fall of 1989, while Davis was employed as a physical education teacher and the boys' basketball coach, the grandfather of an eighth-grade student contacted Bundren to complain about Davis touching his granddaughter in an inappropriate way, by placing his hand under her blouse. Bundren immediately called a meeting with Davis; Davis's supervisor, Dennis Peters, who was the superintendent at the time; the grandfather; and the girl's mother. At the conclusion of this meeting the girl's mother was satisfied by Davis's explanation

<sup>2</sup> *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

that nothing inappropriate had taken place, but in a follow-up conversation, she related to Bundren that she was considering referring the charge to the Department of Human Services (DHS) for investigation. In the meantime, Bundren advised Davis "not to be so friendly with [the] students." Bundren reported the results of the meeting to Widener, a member of the County Board of Education, and placed notes of the meeting in Davis's personnel file.

In January 1990, just a few months after the incident involving the eighth-grade student, DHS notified Peters that the agency had received information that Davis allegedly had sexually abused nine different girls at Midway School. In a letter to Peters, DHS stated that it was giving

official notice that [DHS] is currently investigating reports of child sexual abuse molestation [sic] involving Jeff Davis of Midway School and several students in the Claiborne County School System.

This preliminary information is being passed on to you as Mr. Davis still has access to children in his role as an educator.

This letter is not meant to imply guilt or innocence but to inform you that an investigation is currently underway.

Additional information will be provided to you after the completion of the investigation.

Two months after sending this letter, DHS sent Peters another letter informing him that Davis was still under investigation, that Davis had been informed of the ongoing investigation, that the information was confidential, and that "immediate action"

needed to be taken to ensure that Davis would have "no access to or contact with any child" until further notice because he was named an alleged perpetrator of child sexual abuse. Midway School promptly removed Davis from student contact and placed him in the school's bus garage for the remainder of the school year. Davis was not rehired when the Board made its hiring decisions for the 1990-91 school year.

When Davis received the letter from DHS, he contacted Williams to inform him of the investigation. Peters, in turn, informed Widener and Bundren of the investigation, and Bundren discussed the matter with Widener.

Shortly thereafter, DHS concluded its investigation and informed Peters that it had determined that four of the nine allegations of child sexual abuse were "founded." Peters promptly notified the following parties of the results of DHS's investigation: Widener; Ellis, the superintendent who had made the decision to hire Davis; Burchette, Acting Board Chairman at the time; and Williams and J.P. Barnard, board members. The Executive Committee of the Board, consisting of the Chairman, Superintendent Peters, Widener, and Bundren, met to discuss the DHS findings. The record does not reveal the result of this discussion.

Shortly after this meeting, Peters was ousted from office because he misappropriated public funds and because a court entered judgment against him finding that he had violated the civil rights of school employees.

In the meantime, Davis requested a hearing with DHS to address the four "founded" charges of sexual abuse, but later waived this right. Instead, he negoti-

ated what the parties term a "pre-trial agreement," which, summarized, provided that

(1) DHS would not pursue any criminal proceedings against Davis, but that any criminal proceedings that the alleged victims would wish to pursue would have to be a matter to be decided by the local District Attorney General and the respective victims.

(2) DHS would not place Davis's name on a registry because they had no control over the matter, but that the agency would not place Davis's name in its registry.

(3) DHS would "not take any role" in seeking the suspension of Davis's teaching license, but that it would notify the appropriate school boards so that any further course of action would be up to them.

DHS sent a copy of this "agreement" to Peters. Although all defendants acknowledged knowing about the DHS agreement, only interim superintendent Dobbs, superintendent-elect Norris, and board member Steve Minton stated that they had seen the agreement. Dobbs claims that he "interpreted the agreement to be an exoneration of Davis," and, because Davis was not employed by the Board during this time, Dobbs took no action other than to place the letter in Davis's personnel file. Dobbs, who is being sued in his official capacity only, served as superintendent for only two months: from July 1 through August 31, 1990, well before Davis was rehired and started abusing Doe.

Based upon promises made to Davis by acting chairman Burchette that the School Board would approve his rehiring, defendant Lynn Barnard, princi-

pal of SMMS, went to Davis's home during the summer of 1990 and offered him a position for the 1990-91 school year as a physical education teacher and coach at SMMS. As Davis started to explain the DHS charges, Barnard stated that he didn't "want to hear it." Contrary to school policy, Davis started working at SMMS in August 1990, prior to Board authorization of his employment. Barnard never consulted with Bundren about Davis's previous work history, or inquired into the allegations of sexual abuse. Although Barnard knew that DHS had requested that Davis be removed from student contact, he testified at his deposition that he believed Davis had been exonerated of all charges based on DHS's "pre-trial agreement."

The Board met on September 13, 1990, and voted officially to hire Davis as a teacher at SMMS. Superintendent-elect Norris, who recommended Davis for rehiring, testified that he inspected Davis's file, interpreted the information contained therein as consisting of "unfounded" charges, and additionally asked SMMS Principal Barnard to confirm with DHS that the charges had been "dismissed." Prior to this meeting, the School Board had also met to rehire Peters as principal of CCHS.

Once the 1990-91 school year began, Barnard personally supervised Davis in light of the DHS charges and a "rumor" he had heard about Davis's "possible inappropriate behavior with a female student." On one occasion, Barnard observed Davis engaging in inappropriate behavior by "sitting on some gymnasium bleachers with two eighth-grade girls after a physical education class had been dismissed." He instructed Davis not to sit on the bleachers with the girls, but to send them back to the area where they

belonged. On another occasion, a guidance counselor informed Barnard that a girl complained that Davis had suggested that they "get[ ] naked" while touching her on the ribs. Barnard contacted Norris about this allegation and also contacted DHS. DHS investigated this allegation and issued a finding of "unfounded."

Barnard continued a "close supervision" of Davis, including riding on the bus, on occasions, with the teams Davis coached. When the girls' basketball coach asked Barnard for permission to allow Doe to keep score for Davis's team, Barnard responded: "If you can't find anybody else. If we can't find anybody else." It is at this point that Davis began sexually harassing and abusing Doe.

#### C.

##### District Court Proceedings

Because this appeal presents a number of complex issues, we must set forth in detail the proceedings below. Doe sued Claiborne County, "by and through" the Claiborne County Board of Education, its board members, and school administrators, alleging that defendants had actual notice that Davis had a tendency to sexually abuse students. Doe asserted that their collective failure to remove Davis from student contact and their decision to rehire him for the 1990-91 school year showed a deliberate indifference to Doe's "safety, health and welfare," in violation of the Fourteenth Amendment of the United States Constitution. Doe also sued the County and the School Board for sexual harassment in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-88, on the grounds that Davis was an agent of the School Board and his conduct created a hostile sexual environment for Doe.

Doe's section 1983 claim alleged that the School Board had a "custom" of ignoring the unconstitutional behavior of its employees, as evidenced by its rehiring of Peters after he was ousted from office and its rehiring of Davis after DHS issued a finding of four "founded" charges of sexual abuse and molestation of school children. In turn, the complaint alleged, the DHS investigations into nine alleged incidents of sexual abuse showed Davis's "pattern" of engaging in such conduct and the corresponding "notice" to the Board of the existence of such conduct.

The board members' and administrators' "actual notice" of these incidents are the basis for Doe's individual capacity claims. That is, she alleges that because each and every defendant named knew about the DHS investigations, their failure to remove Davis from student contact and their decision to rehire him for 1990-91 show a deliberate indifference to her constitutional rights.

Following defendants' motions for summary judgment, or in the alternative, motions to dismiss, the district court dismissed Doe's claim in a series of three orders. First, the district court dismissed Doe's section 1983 claims against all defendants on the grounds that it "perceive[d no] basis on which a reasonable trier of fact could find that the defendants county, school board, board members, superintendents, and the principal Mr. Bundren showed deliberate indifference to any deprivation" of plaintiff's rights. The court preliminarily determined, however, that Doe's right to be free from sexual abuse at the hands of a public school teacher was clearly established and that the school "had a clearly established duty to a public school student like Jane Doe to

protect her from a violation of her liberty interest in freedom from sexual abuse."

The court reasoned that Doe's claims should be dismissed nevertheless because the defendants were "entirely objectively reasonable" in concluding that the "pre-trial agreement" entered into by Davis and DHS "exonerated" Davis of the allegations made against him. Additionally, the court concluded, the individual defendants appropriately depended on the superintendents to advise them on the conclusions reached by DHS; they did not have an independent duty to investigate each and every allegation.

The court rejected plaintiff's argument that the School Board had a "custom" of ignoring the pattern of misconduct of its employees. Doe alleged that evidence of the "custom" was the School Board's decision to rehire Peters and Davis despite several alleged improprieties. However, none dealt with sexual abuse. Doe's claim was that the School Board maintained a "good old boys network," which she claimed was supported by the following facts: that Peters was ousted from public office for knowingly and willingly misapplying public funds, see *State ex rel. Estep v. Peters*, 815 S.W.2d 161 (Tenn. 1991); that Peters had violated the civil rights of two Claiborne County School System employees, see *Bundren v. Peters*, 732 F. Supp. 1486 (E.D. Tenn. 1989); that Peters may have used a school credit card to pay for prostitute services; and that Davis was rumored to have gambled and committed financial improprieties as the director of a civic center. The court concluded that even if the allegations regarding Peters are accepted as true, they are not "evidence of anyone's proclivity to commit sexual molestation of public school students or to be deliberately indifferent to

such molestation." The court thus concluded that all defendants sued in their individual capacities were entitled to "good faith immunity." The court also dismissed all the claims brought under the Tennessee Governmental Tort Liability Act on the grounds that defendants' conduct was not willful, wanton, or grossly negligent. Doe has not appealed that decision to this court.

With respect to Doe's Title IX claim, the court first dismissed the County as a proper party on the basis that the term "local educational agency," as the term is used in 20 U.S.C. § 1687(2)(B), does not include the County.

The court's decision to dismiss the Title IX claim against the School Board was tied to its previous decision to exclude all of plaintiff's "knew or should have known" evidence from trial. As a result of defendants' motions in limine, the court excluded, inter alia, any and all allegations of sexual abuse made against Davis by any person other than Doe; any DHS correspondence; any reference to Davis's Alford plea to the statutory rape charge; and any evidence of a "good old boys" network. Having excluded all this evidence, the court concluded that Doe could not state a claim under Title IX because Title VII agency principles do not apply to Title IX actions; that is, vicarious liability, in the absence of notice, is not available as part of a supervisory hostile environment cause of action under Title IX. In reaching this decision, the district court relied on the sole district court case to have so concluded, *Floyd v. Waiters*, 831 F.Supp. 867 (M.D. Ga. 1993). With all her causes of action dismissed, except those against Davis, plaintiff voluntarily dismissed the remaining claims to facilitate this appeal.

## II.

## A.

This case presents several important issues of first impression: the scope of municipal liability under 42 U.S.C. § 1983 for its failure to act in a teacher-student sexual abuse case; the scope of a school administrator's liability, sued in his individual capacity, for his alleged failure to prevent a student's sexual abuse at the hands of a school employee; and the elements of a cause of action against a public school for sexual harassment under Title IX. We decide these issues of law de novo.

We review grants of summary judgment de novo using the same test used by the district court. *Brooks v. American Broadcasting Cos.*, 932 F.2d 495, 500 (6th Cir. 1991). Under Fed.R.Civ.P. 56(c), summary judgment is proper if, viewing all the evidence before the district court in the light most favorable to the non-moving party, "there is no genuine issue as to any material fact and that the moving party is entitled to [a] judgment as a matter of law." *Canderm Pharmacal, Ltd. v. Elder Pharmaceuticals, Inc.*, 862 F.2d 597, 601 (6th Cir. 1988) (quoting Fed.R.Civ.P. 56(c)); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970).

Summary judgment is proper only when "the record taken in its entirety could not convince a rational trier of fact to return a verdict in favor of the nonmoving party." *Cox v. Kentucky Dep't of Transp.*, 53 F.3d 146, 150 (6th Cir. 1995). In this context, "a party may rely upon circumstantial and inferential evidence to defeat a . . . summary judgment motion." *Id.* at 151.

## B.

We first address the dismissal of Doe's section 1983 claim against the County and the School Board. Although plaintiff seems to be unclear about the principles governing her claim, she apparently advances two theories to support her municipal liability cause of action. First, she argues that the School Board had a custom or policy of inaction toward the pattern of misconduct of its employees and that such inaction showed a deliberate indifference to Doe's constitutional rights. Doe seems to argue that the School Board's "custom" or "policy" of having what she labels a "good old boys network" resulted in her abuse by Davis.

Second, plaintiff asks this court to extend *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 197, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989), to reach the conduct alleged in this case by holding that Tennessee's in loco parentis statute creates a "special relationship" between Doe and the school. If such "special relationship" exists, the substantive component of the Fourteenth Amendment's Due Process Clause imposes upon the school a constitutional duty to protect her against the sexual abuse by a school employee. For the reasons that follow we reject these arguments and affirm the dismissal of plaintiff's section 1983 claim against the County and the School Board. We do so, however, on grounds other than those advanced by the district court. *Herm v. Stafford*, 663 F.2d 669, 684 (6th Cir. 1981).

## 1.

A plaintiff can bring a claim under section 1983 when she is deprived "of any rights, privileges, or

immunities secured by the Constitution and laws," as a result "of any statute, ordinance, regulation, custom, or usage, of any State." 42 U.S.C. § 1983. A municipal liability claim against the County and the School Board must be examined by applying a two-pronged inquiry:

(1) Whether the plaintiff has asserted the deprivation of a constitutional right at all; and

(2) Whether the County and/or the School Board is responsible for that violation.

See *Collins v. City of Harker Heights*, 503 U.S. 115, 120, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992). For liability to attach, both questions must be answered in the affirmative.

The threshold determination, therefore, is whether the sexual abuse perpetrated against Doe amounts to a constitutional violation. We answer this question by examining the nature of the right claimed to have been infringed upon: the right to be free from sexual abuse at the hands of a state actor, which right is clearly embraced by the more general right to personal security and to bodily integrity. We treat these questions as one.

The right to personal security and to bodily integrity bears an impressive constitutional pedigree. As far back as 1891, the Supreme Court recognized that "[n]o right is held more sacred, or is more carefully guarded . . . than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251, 11 S.Ct. 1000, 35 L.Ed. 734 (1891). The Court has

subsequently recognized the constitutional standing of such a right in a variety of contexts. In *Ingraham v. Wright*, 430 U.S. 651, 673, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977), the Court declared that "[a]mong the historic liberties" protected by the Due Process Clause is the right against "unjustified intrusions on personal security" at the hands of the state. See also *Youngberg v. Romeo*, 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982). In *Albright v. Oliver*, 510 U.S. 266, —, 114 S.Ct. 807, 812, 127 L.Ed.2d 114 (1994), the Court stated that "[t]he protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity."

Following this long tradition, this court, too, has recognized the importance of this right. We held that children have a substantive due process right to be free from infliction of harm in state-regulated foster homes, *Meador v. Cabinet for Human Resources*, 902 F.2d 474, 476 (6th Cir.), cert. denied, 498 U.S. 867, 111 S.Ct. 182, 112 L.Ed.2d 145 (1990), and that "[i]t is well established that persons have a fourteenth amendment liberty interest in freedom from bodily injury," *Webb v. McCullough*, 828 F.2d 1151, 1158 (6th Cir. 1987). In *Poe v. Haydon*, 853 F.2d 418, 429-30 (6th Cir. 1988), cert. denied, 488 U.S. 1007, 109 S.Ct. 788, 102 L.Ed.2d 780 (1989), we recognized that the right to be free of invidious sex discrimination at the hands of the state was clearly established.

Although we have never addressed the precise factual situation presented to us here, every court of appeals that has had the opportunity to consider the issue has logically recognized that the right to be free from sexual abuse at the hands of a public school teacher is clearly protected by the Due Process

Clause of the Fourteenth Amendment. For example, in *Stoneking v. Bradford Area School District*, 882 F.2d 720, 726 (3d Cir. 1989), cert. denied, 493 U.S. 1044, 110 S.Ct. 840, 107 L.Ed.2d 835 (1990), the Third Circuit stated that “[i]t may seem ludicrous to be obliged to consider whether it was ‘clearly established’ that it was impermissible for school teachers and staff to sexually molest students.” And, the Fifth Circuit concluded that “[i]t is incontrovertible that bodily integrity is necessarily violated when a state actor sexually abuses a schoolchild.” *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 451 (5th Cir.) (en banc), cert. denied, — U.S. —, 115 S.Ct. 70, 130 L.Ed.2d 25 (1994). See also *Abeyta v. Chama Valley Indep. Sch. Dist.*, 77 F.3d 1253, 1255 (10th Cir. 1996).

Upon consideration, we hold that a schoolchild’s right to personal security and to bodily integrity manifestly embraces the right to be free from sexual abuse at the hands of a public school employee. The substantive component of the Due Process Clause protects students against abusive governmental power as exercised by a school. See *Howard v. Grinage*, 82 F.3d 1343, 1349 (6th Cir. 1996). To be sure, the magnitude of the liberty deprivation that sexual abuse inflicts upon the victim is an abuse of governmental power of the most fundamental sort; it is an unjustified intrusion that strips the very essence of personhood. If the “right to bodily integrity” means anything, it certainly encompasses the right not to be sexually assaulted under color of law. This conduct is so contrary to fundamental notions of liberty and so lacking of any redeeming social value, that no rational individual could believe that sexual abuse by a state actor is constitutionally permissible under the Due Process Clause.

Our holding in *United States v. Lanier*, 73 F.3d 1380 (6th Cir. 1996) (en banc ), cert. granted, No. 95-1717, 64 USLW 3830/3837 (June 17, 1996), is not to the contrary. In *Lanier*, we stated that neither this circuit nor the Supreme Court had explicitly held that the “right to be free from rape and sexual assault and harassment” was “a component of an enforceable general constitutional right to ‘bodily integrity.’” *Id.* at 1388. This is no doubt a true statement. The Supreme Court has never so held; and until today, this court has not had the opportunity to consider the question. In any case, *Lanier*’s reasoning on this issue is of limited applicability in the civil context, where the constitutional concerns underlying the *Lanier* decision are simply nonexistent.

In *Lanier*, we were concerned with the constitutional implications of a vaguely worded federal criminal statute, which criminalized “the wilful ‘deprivation of any rights . . . protected by the Constitution’ committed by any person under ‘color of any law.’” *Id.* at 1382. We held only “that sexual assaults may not be prosecuted as violations of a constitutional substantive due process right to bodily integrity.” *Id.* at 1393. We reasoned that the absence of specific case law defining the constitutional crime with which the government charged Lanier violated the fundamental requirements that criminal statutes “be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties. . . .” *Id.* at 1389 (citation omitted). The absence of precedent specifically holding that the type of conduct in which Lanier engaged was the type of behavior that could subject someone to criminal liability, clearly implicated due process limitations, ex post facto considerations, the

danger of arbitrary judgments, and a variety of other constitutional concerns.

Claims under section 1983 simply do not present these types of concerns. We therefore hold that Doe had a clearly established right under the substantive component of the Due Process Clause to personal security and to bodily integrity, that such right is fundamental, and that Davis's sexual abuse of Doe violated that right.

Having answered the first question in the affirmative, we consider next whether the municipal defendants are responsible for that violation. Doe cannot base her claim against the County and the School Board solely on Davis's conduct, for respondeat superior is not available as a theory of recovery under section 1983. *Monell v. Department of Social Servs.*, 436 U.S. 658, 691, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Rather, she must show that the School Board itself is the wrongdoer. *Collins*, 503 U.S. at 122. Under *Monell*, the County and the School Board cannot be found liable unless the plaintiff can establish that an officially executed policy, or the toleration of a custom within the school district leads to, causes, or results in the deprivation of a constitutionally protected right. *Monell*, 436 U.S. at 690-91. Doe does not assert that her sexual abuse resulted from an officially enacted policy. Rather, she claims that section 1983 liability exists due to a "custom," which, although not officially adopted or established through the decision-making channels, led to Davis sexually abusing her. See *City of St. Louis v. Praprotnik*, 485 U.S. 112, 121, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988).

A "custom" for purposes of *Monell* liability must "be so permanent and well settled as to constitute a custom or usage with the force of law." *Monell*, 436

U.S. at 691 (internal quotation marks and citation omitted); see also *Feliciano v. City of Cleveland*, 988 F.2d 649, 655 (6th Cir.), cert. denied, 510 U.S. 826, 114 S.Ct. 90, 126 L.Ed.2d 57 (1993). In turn, the notion of "law" must include "[d]eeply embedded traditional ways of carrying out state policy." *Nashville, Chattanooga & St. Louis Ry. Co. v. Browning*, 310 U.S. 362, 369, 60 S.Ct. 968, 84 L.Ed. 1254 (1940). It must reflect a course of action deliberately chosen from among various alternatives. *City of Oklahoma v. Tuttle*, 471 U.S. 808, 823, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985). In short, a "custom" is a "legal institution" not memorialized by written law. *Feliciano*, 988 F.2d at 655.

In addition to showing that the School Board as an entity "caused" the constitutional violation, plaintiff must also show a direct causal link between the custom and the constitutional deprivation; that is, she must "show that the particular injury was incurred because of the execution of that policy." *Garner v. Memphis Police Dep't*, 8 F.3d 358, 364 (6th Cir. 1993) (emphasis added) (citation omitted), cert. denied, 510 U.S. 1177, 114 S.Ct. 1219, 127 L.Ed.2d 565 (1994). This requirement is necessary to avoid de facto respondeat superior liability explicitly prohibited by *Monell*.

The analytical difficulty in this case stems from the type of "custom" that the plaintiff claims directly caused Davis to sexually abuse her. Doe does not claim that the School Board had a custom of affirmatively condoning sexual abuse. Clearly, no municipality could have such a policy. Rather, Doe claims that the custom was to fail to act to prevent the sexual abuse.

To state a municipal liability claim under an "inaction" theory, Doe must establish:

- (1) the existence of a clear and persistent pattern of sexual abuse by school employees;
- (2) notice or constructive notice on the part of the School Board;
- (3) the School Board's tacit approval of the unconstitutional conduct, such that their deliberate indifference in their failure to act can be said to amount to an official policy of inaction; and
- (4) that the School Board's custom was the "moving force" or direct causal link in the constitutional deprivation.

See *City of Canton v. Harris*, 489 U.S. 378, 388-89, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989); see also *Thelma D. v. Board of Educ. of City of St. Louis*, 934 F.2d 929, 932-33 (8th Cir. 1991). The *Monell* custom requirement is an essential element of this claim. The evidence must show that the need to act is so obvious that the School Board's "conscious" decision not to act can be said to amount to a "policy" of deliberate indifference to Doe's constitutional rights. *City of Canton*, 489 U.S. at 389. "Deliberate indifference" in this context does not mean a collection of sloppy, or even reckless, oversights; it means evidence showing an obvious, deliberate indifference to sexual abuse.

The evidence Doe advanced does not show that the School Board, as an official policymaking body, had a "custom" that reflected a deliberate, intentional indifference to the sexual abuse of its students. It may be freely conceded that the board members, individually, might have been recklessly passive in the performance of their duties. One could even argue that they

were reckless in their failure, collectively, to inquire further into the allegations lodged against Davis and/or to clarify the results of the DHS investigation. It cannot be said, however, that their failure to act in Davis's case was the direct result of a custom in the sense that the School Board consciously never acted when confronted with its employees' egregious and obviously unconstitutional conduct. The delegation to DHS to initiate an investigation was appropriate. Reliance on the superintendent's recommendation for rehiring was likewise appropriate. Their failure independently to investigate further is simply not "board action" and certainly does not amount to a custom on which constitutional tort liability may be affixed.

Because the failure to present sufficient evidence to establish the existence of a policy of inaction ends the inquiry, we express no view on whether, if such custom had been established, the inaction of the School Board would have amounted to deliberate indifference. There is an analytical distinction between being deliberately indifferent as to one particular incident, and having a "policy" of always being deliberately indifferent to unconstitutional actions. A municipality could be found to have a policy of failing to act in the face of repeated constitutional violations. But it could also be found to have acted reasonably, or even negligently, in a particular case, thus precluding liability.

The district court did not consider whether Doe presented sufficient evidence from which the existence of a custom or policy could be inferred as an initial matter. The court assumed that such policy existed and proceeded to analyze whether the defendants had been "deliberately indifferent." Just as the existence of a constitutional right must be the

threshold determination in any section 1983 claim, the finding of a custom or policy is the initial determination to be made in any municipal liability claim. If a plaintiff advances sufficient evidence to create a genuine issue of material fact as to the existence of such custom or policy, then the question of "deliberate indifference" is one for the jury to decide and not for the court at the summary judgment stage. See *Hicks v. Frey*, 992 F.2d 1450, 1456-57 (6th Cir. 1993).

Even if what Doe labels as "good old boys network" evidence were sufficient to state a claim, which we hold it is not, she would still fail to meet the essential causation requirement for section 1983 liability to attach. Obedience to the rule that respondeat superior liability does not attach to a municipality requires that we carefully scrutinize the causation element of Doe's claim that she was a victim of the School Board's "custom" of inaction; that is, her claims that the School Board routinely acquiesced to the misbehavior of its employees in order to protect its "good old boys." She points to evidence that Peters was ousted from office, among other things, for misappropriating funds, and also asserts that the School Board knew that Davis had gambling problems. She argues that a "custom" of a "good old boys network" existed because, even in the face of this evidence, the School Board rehired both Peters and Davis. Even taking this evidence at face value and assuming that these two isolated incidents amounted to a "policy" in the *Monell* sense, there is no direct causal connection between such policy and the sexual abuse inflicted by Davis.

We have no occasion to decide here whether a different quantum of evidence might support an action against a school board in a different context; we hold

that, in this case, the evidence presented simply does not amount to a custom of tacit authorization of sexual abuse or obvious deliberate indifference to Doe's constitutional rights. We will affirm the dismissal of Doe's section 1983 claim against the School Board. We will also dismiss the claim against the County because Doe failed to articulate or plead a policy attributable to it. The conclusory statement that she is suing the County "by and through" the Claiborne County Board of Education simply does not state a claim under section 1983.

We will also affirm the dismissal of the official capacity claims against Widener, Dobbs, and Bundren because a suit against an official of the state is treated as a suit against the municipality. *Kentucky v. Graham*, 473 U.S. 159, 165-66, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985). Widener, Dobbs, and Bundren are therefore entitled to judgment as a matter of law.

## 2.

Alternatively, Doe asks this court to hold as a matter of law that under *DeShaney*, 489 U.S. at 197, the School Board had a constitutional duty to protect her from Davis's sexual abuse, which duty arises as a result of the "special relationship" created between her and the school district by Tennessee's in loco parentis statute. The existence of this duty does not depend upon a finding of a custom or policy.

*DeShaney* involved a child who had been severely beaten by his father, as a result of which the child suffered brain damage. The child's mother had complained on repeated occasions to the Department of Social Services, which took some steps to protect the child, but failed to remove him from his father's custody. The mother brought suit under section 1983,

claiming that the state had an “affirmative constitutional duty” to protect her son from the abuse of his father. *Id.* at 193-94. The Court held that the government had no substantive due process duty to protect a child not in state custody from physical abuse by his father, a private actor over whom it had no control. *Id.* at 201. In reaching this conclusion, the Court distinguished the situation in which the Due Process Clause does impose an affirmative duty on the state to act to protect the security of persons within its control. *Id.* at 200. The Court held that where the state imposes limitations on an “individual’s freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty,” the substantive component of the Due Process Clause “imposes upon it a corresponding duty to assume responsibility for his safety and general well-being.” *Id.*

In contrast, the Constitution imposes no duty on the state to protect individuals from the harm suffered at the hands of a “private” actor, especially where “it played no part in [the creation of the danger], nor did it do anything to render him any more vulnerable to [it].” *Id.* at 201. Thus, the type of “special relationship” that makes a constitutional claim viable involves state custody or control.

We recently decided a case involving the “special relationship” concept and the concomitant “duty” of a school to its students, *Sargi v. Kent City Bd. of Educ.*, 70 F.3d 907 (6th Cir. 1995). We held that compulsory attendance laws do not create a “special relationship” between school districts and their students that give rise to an “affirmative duty” on the part of the school to protect its students while riding a school bus. *Id.* at 911. *Sargi* involved a section 1983

action against a school board and several of the school administrators resulting from the death of a female student in a school bus due to heart failure. Plaintiff argued that there was a “special relationship” between the school and the decedent that gave rise to a constitutional duty to protect her constitutional rights, and that the school breached that duty by failing to protect her rights. *Id.* at 910. The *Sargi* court rejected this theory.

The court held that under the particular facts of the case, there was no “special relationship” that gave rise to a constitutional duty on the part of the school board to protect students from the consequences of a seizure while on a school bus. *Id.* at 911. The court explicitly stated: “We do not hold that school districts have no duty of protection of students in other situations not before us. The nature and extent of such duties will have to be decided case by case.” *Id.*

Although, clearly, a school system has an unmistakable duty to create and maintain a safe environment for its students as a matter of common law, its in loco parentis status or a state’s compulsory attendance laws do not sufficiently “restrain” students to raise a school’s common law obligation to the rank of a constitutional duty. Other circuits that have considered the question have reached the same conclusion. See, e.g., *Dorothy J. v. Little Rock Sch. Dist.*, 7 F.3d 729, 732 (8th Cir. 1993); *Maldonado v. Josey*, 975 F.2d 727, 732-33 (10th Cir. 1992), cert. denied, 507 U.S. 914, 113 S.Ct. 1266, 122 L.Ed.2d 662 (1993); *D.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364, 1372-73 (3d Cir. 1992) (en banc), cert. denied, 506 U.S. 1079, 113 S.Ct. 1045, 122 L.Ed.2d 354 (1993); *J.O. v. Alton Community Unit Sch. Dist.*, 909 F.2d

267, 272-73 (7th Cir. 1990). The Due Process Clause, while serving as an essential vehicle to the vindication of a state's abridgment of fundamental aspects of life, liberty, and property, does not impose absolute constitutional liability on a state. Were this not the case, the most trivial of common law torts would rise to the level of a constitutional violation.

Although the facts of this case are tragic and we are deeply disturbed by Davis's sexual abuse of Doe, the limitations of our judicial authority do not permit us to provide the relief Doe seeks. We follow, as we must, the clear rule of *DeShaney* and its progeny and conclude that Tennessee's in loco parentis statute does not create a "special relationship" between Doe and the School Board, and therefore the Due Process Clause does not impose an affirmative constitutional duty on the School Board to assume the responsibility of protecting its students against the unconstitutional acts of its employees.

### III.

We address next Doe's individual capacity claims. As noted above, Doe sued seven defendants in their individual capacities making the same argument she offered to support her municipal liability claims: that the individual board members and school administrators were deliberately indifferent to the deprivation of her constitutional rights. She claims that the defendants' inaction should subject them to liability.

As with the claims discussed above, our resolution of this issue must begin with the preliminary determination of whether Doe has stated a claim under section 1983 against each individual defendant. As an initial matter, Doe must show that

(1) she was deprived of a right secured by the Constitution; and that

(2) such deprivation occurred under color of state law.

42 U.S.C. § 1983. We have already concluded that she has satisfied the first requirement. The second, however, requires us to determine which state actors can be held responsible for the constitutional injury caused directly by someone other than those sought to be held accountable. We have already implicitly held that Davis was a state actor and that therefore the constitutional injury occurred under color of law. However, Doe seeks to hold the board members, the superintendent, and SMMS's principal, not Davis, liable.

The so-called "supervisory liability" test we established in *Bellamy v. Bradley*, 729 F.2d 416 (6th Cir.), cert. denied, 469 U.S. 845, 105 S.Ct. 156, 83 L.Ed.2d 93 (1984), provides an incomplete approach to the resolution of the claims against Burchette, Williams, Ellis, and J.P. Barnard. Under the title of "DEROGATION OF DUTIES BY PRISON OFFICIALS" we held that

[the section] 1983 liability of supervisory personnel must be based on more than the right to control employees. Section 1983 liability will not be imposed solely upon the basis of respondeat superior. There must be a showing that the supervisor encouraged the specific incident of misconduct or in some other way directly participated in it.

*Id.* at 421 (emphasis added). "At a minimum," we held, a "plaintiff must show that a supervisory official at

least implicitly authorized, approved or knowingly acquiesced in the unconstitutional conduct of the offending subordinate.” *Id.* This holding followed section 1983’s requirement that the person sought to be held accountable actually have “caused” the deprivation, and was based on the fact that the individual defendants had supervisory responsibilities.

Here, the individual board members had no individual supervisory responsibilities other than those imposed on the School Board as a whole. Although the School Board can act as an entity, and indeed as a governing body it has the statutory duty to supervise school personnel, see TENN. CODE ANN. § 49-2-202 & 203, the individual School Board members cannot “act” independently. Liability for a failure to act necessarily implies a “duty” to carry out the action the person is accused of derogating. Under Tennessee law, “[t]he duties of the school board are imposed on the entire board and not on individual members.” *State ex rel. Thompson v. Walker*, 845 S.W.2d 752, 759 (Tenn. Ct. App. 1992). This is not to say that constitutional liability is determined solely by resorting to state law definitions of duty. However, it provides a starting point of analysis, for constitutional tort liability on the basis of inaction must derive from some identifiable source of duty. We think the relevant question for purposes of section 1983 liability in this context is whether the duty to have taken some action is of such a nature that the individual’s inaction will render him responsible for the constitutional harm. See *Doe v. Rains County Indep. Sch. Dist.*, 66 F.3d 1402, 1408-09 (5th Cir. 1995).

The Due Process Clause “does not purport to supplant traditional tort law in laying down rules of con-

duct to regulate liability for injuries that attend living together in society.” *Id.* (quoting *Collins*, 503 U.S. at 128). Although constitutional line-drawing is no doubt always problematic, it remains clear that not every tort rises to the level of a constitutional violation; thus, some threshold standard must define the conduct that falls on either side of the line.

Because section 1983 has a “color of law” requirement, a board member can be held liable only if state law, whether provided by statute or judicially implied, empowers him with some legal obligation to act. See *Rains County*, 66 F.3d at 1411. A “duty” under “color of law” must be a distinct element of a section 1983 case alleging a “failure to act.” That is, a plaintiff must show that an individual defendant failed to act under color of law. See *id.* If state law does not impose a duty to take action, “there is no conduit through which an exercise of state power can be said to have caused the constitutional injury.” *Id.* at 1416.

Defendants’ positions as board members, without more, cannot be the basis for the existence of this element; “a person does not act under color of state law solely by virtue of [his] relationship to the state,” instead, liability depends on the nature of his conduct. *Id.* at 1411 (citing *Polk County v. Dodson*, 454 U.S. 312, 319-20, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981)). The absence of an identifiable duty would leave a malleable and elusive standard of conduct to which officials should conform their actions, rendering the causal connection between the omission and the deprivation far too abstract to impose section 1983 liability. This result is not reasonably obtainable under the plain language of section 1983.

We conclude that to state a claim for a failure to act when the alleged wrongdoer is not a supervisory

government official, a plaintiff must separately establish the "color of law" requirement of section 1983 by identifying some cognizable duty that state or federal law imposes upon the alleged "enactor." In the absence of a duty there is no section 1983 liability because the failure to act cannot be said to have occurred under color of law.

Doe has failed to articulate what she expected the individual board members to do. Both in her brief and at oral arguments, her counsel simply asserted that the defendants were deliberately indifferent to her constitutional rights. Such assertion simply does not state a claim under section 1983. As a starting matter, none of the defendants in this case had any knowledge of Davis's abuse of Doe. Thus Doe's claim cannot be based on the fact that defendants failed to report Davis's sexual abuse of her. Alternatively, her assertions, although wholly unclear, seem to imply that the individual board members should not have voted to rehire Davis for the 1990-91 school year due to the results of the DHS investigation that took place in 1990. Certainly, the School Board could have voted not to rehire him. However, this discretionary decision, on the basis of the evidence they had before them at the time, does not begin to articulate the source of their duty to have done otherwise. Neither Burchette, nor Williams, nor Ellis, nor J.P. Barnard could have "acted" independently of the School Board to prevent Davis's rehiring. These School Board members simply have no individual supervisory responsibilities. To create the legal fiction that such supervisory responsibility exists solely by virtue of serving as a member of an official body is to ignore the reality that these board members were unable to act, in a legal sense, except as constituent members of

a board majority. We think the "color of law" requirement of section 1983 requires more than what plaintiff has alleged here.

We have no occasion to consider whether there is some yet unpleaded obligation for an individual board member affirmatively to act, for example, to inform the School Board as a whole, in the face of known violations of a student's constitutional rights, and whether the failure to act in such circumstances might subject him to section 1983 liability. But we hold that in this case, for the reasons we have explained, Doe has failed to state a claim against Burchette, Williams, Ellis, and J.P. Barnard in their individual capacities. Because on these facts plaintiff cannot maintain a federal cause of action against these defendants, we have no need to reach the question of qualified immunity, the grounds on which the district court disposed of this claim.

As to former superintendent Peters, current superintendent Norris, and principal Lynn Barnard, we hold that "supervisory liability" standards apply to resolve the claim against them and conclude that the claim should likewise be dismissed without reaching the question of qualified immunity.

These three defendants had a statutory duty to supervise Davis and to take independent action for reported acts of misconduct. They clearly did so. They reported the allegations to DHS, they removed Davis from student contact, and Barnard closely supervised Davis due to his concerns about past incidents of alleged child abuse. Norris had Barnard call DHS to make certain that Davis had been "exonerated" of all previous charges. Peters was ousted from office in 1990 and was not in the position to vote for the rehiring of Davis at the 1990 board meeting.

Whatever he did, or failed to do prior to that time, cannot be causally connected to the abuse of Doe.

It may be freely conceded that the actions of these individuals left a lot to be desired. They may have been sloppy, reckless, or neglectful in the performance of their duties. But that is not enough for section 1983 liability under the precedent laid down in *Bellamy*, 729 F.2d 416, and *Barber v. City of Salem*, 953 F.2d 232 (6th Cir. 1992). A plaintiff must show that, in light of the information the defendants possessed, the teacher who engaged in sexual abuse "showed a strong likelihood that he would attempt to" sexually abuse other students, such that the "failure to take adequate precautions amounted to deliberate indifference" to the constitutional rights of students. See *id.* at 240. *Bellamy* presents but another way of analyzing this claim; whether defendants' conduct amounted to a tacit authorization of the abuse. *Bellamy*, 729 F.2d at 421.

Defendants here were simply not confronted with such a widespread pattern of constitutional violations that their actions or inactions amounted to a deliberate indifference to the danger of Davis sexually abusing students. The steps they did take, and even those they failed to take and arguably should have taken, do not show that they "encouraged the specific incident of misconduct or in some other way directly participated in it." *Id.* Nor did they authorize, approve, or knowingly acquiesce in Davis's unconstitutional conduct. *Id.* They had no knowledge, constructive or otherwise, that Davis was abusing Doe. We therefore affirm the dismissal of the claims against Peters, Norris, and Lynn Barnard on grounds other than those stated by the district court.

#### IV.

Doe also asserted a claim against the School Board on the basis of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-88. She claims that Davis's sexual abuse amounts to sexual harassment under the statute subjecting the School Board to liability. Section 1681 provides, in relevant part: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ." 20 U.S.C. § 1681. The preliminary issues are uncontroversial. It is unquestionable that Doe has a private right of action under Title IX, see *Cannon v. University of Chicago*, 441 U.S. 677, 688-89, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979), for both injunctive relief and monetary damages. *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 72-73, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992). Further, the "discrimination" prohibition of Title IX encompasses the sexual harassment of a student by a teacher. *Id.* at 75.

Moreover, the Civil Rights Restoration Act of 1987 expanded the scope of Title IX. See 20 U.S.C. § 1687(2)(A). The Act reads:

The Congress finds that—(1) certain aspects of recent decisions and opinions of the Supreme Court have unduly narrowed or cast doubt upon the broad application of title IX . . . and (2) legislative action is necessary to restore the prior consistent and long-standing executive branch interpretation and broad, institution-wide application of those laws as previously administered.

20 U.S.C. § 1687 (hist. and stat. notes). Thus, Title IX's application should be accorded "a sweep as broad as its language." See *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521, 102 S.Ct. 1912, 72 L.Ed.2d 299 (1982) (citation omitted).

The issue we must decide is one of first impression in this circuit: whether Title VII agency principles apply to sexual harassment cases brought under Title IX. Because Title VII sexual harassment and sexual discrimination principles have been so well litigated, while Title IX has a short historical parentage, courts have and do resort to Title VII standards to resolve sexual harassment claims brought under Title IX. See, e.g., *Davis v. Monroe County Bd. of Educ.*, 74 F.3d 1186 (11th Cir. 1996); *Murray v. New York Univ. College of Dentistry*, 57 F.3d 243 (2d Cir. 1995); *Preston v. Commonwealth of Virginia ex rel. New River Community College*, 31 F.3d 203 (4th Cir. 1994); *Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988). This practice implicitly received the Supreme Court's approval in *Franklin*.

*Franklin* involved a hostile environment sexual harassment claim by a student against a public school. The student alleged that a teacher coerced her into having intercourse and that the school had ignored her complaints. *Franklin*, 503 U.S. at 63-64. The Court held that hostile environment claims are cognizable under Title IX and adopted Title VII principles to reach that conclusion:

Unquestionably, Title IX placed on the Gwinnett County Public Schools the duty not to discriminate on the basis of sex, and "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discrimi-

nate[s]' on the basis of sex." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64, 106 S.Ct. 2399, 91 L.Ed.2d 49 [(1986)]. We believe the same rule should apply when a teacher sexually harasses and abuses a student. Congress surely did not intend for federal moneys to be expended to support the intentional actions it sought by statute to proscribe.

*Id.* at 75. By citing *Meritor Savings Bank*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49, a Title VII hostile environment case, the Court indicated that it views with approval the application of Title VII principles to resolve similar Title IX cases.

Both Title IX's legislative history and the regulations enacted pursuant to it amply support this approach. The House Report on Title IX states that "Title VII . . . specifically excludes educational institutions from its terms. [Title IX] would remove that exemption and bring those in education under the equal employment provision." 1972 U.S.C.C.A.N. 2462, 2512. And, the regulations define a "recipient" as

any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance, including any subunit, successor, assignee, or transferee thereof.

34 C.F.R. § 106.2(h) (emphasis added). Finally, although not having the force of law, the Office for Civil

Rights, the agency charged with enacting regulations under Title IX, has articulated that Title VII agency principles should apply to Title IX cases. It defined sexual harassment under Title IX as "consist[ing] of verbal or physical conduct of a sexual nature, imposed on the basis of sex, by an employee or agent of a recipient that denies, limits, provides different, or conditions the provision of aid, benefits, services or treatment protected under Title IX." OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., SEXUAL HARASSMENT: IT'S NOT ACADEMIC 2 (1988) (emphasis added) (citing OCR Policy Memorandum from Antonio J. Califa, Director for Litigation, Enforcement and Policy Service, OCR, to Regional Civil Rights Directors (Aug. 31, 1981)).

There is ample authority to support our conclusion that Title VII agency principles apply to resolve discrimination claims brought under Title IX. We find the district court's reliance on the sole district court decision to have concluded to the contrary, see *Floyd*, 831 F. Supp. 867, to be in error. We remand this case to the district court for an application of Title VII standards to plaintiff's sexual harassment claim. In doing so, we express no view on the merits of her claim.

To guide the district court upon remand, we clarify the following principles. First, a "hostile environment" sexual harassment claim is cognizable under Title IX. See *Franklin*, 503 U.S. 60, 112 S.Ct. 1028, 117 L.Ed.2d 208; *Meritor Sav. Bank*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49. Second, the elements to state a supervisory hostile environment claim under Title VII equally apply under Title IX. See *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796 (6th Cir. 1994); see also *Kauffman v. Allied Signal, Inc.*, 970

F.2d 178 (6th Cir.), cert. denied, 506 U.S. 1041, 113 S.Ct. 831, 121 L.Ed.2d 701 (1992); *Poe v. Haydon*, 853 F.2d 418 (6th Cir. 1988), cert. denied, 488 U.S. 1007, 109 S.Ct. 788, 102 L.Ed.2d 780 (1989). Finally, whether conduct about which a plaintiff complains created a "hostile environment" under Title IX, and whether the educational entity took appropriate action after knowing of inappropriate conduct, are factual questions for the jury to resolve. *Mann v. University of Cincinnati*, 864 F.Supp. 44, 46 (S.D. Ohio 1994).

#### V.

The final issue we address is the challenge to the district court's decision to exclude all of Doe's notice evidence on the basis of Rule 403 of the Federal Rules of Evidence. A district court's evidentiary balancing under Rule 403 is a decision this court reviews for abuse of discretion. *Doe v. Sullivan County*, 956 F.2d 545, 559 (6th Cir.), cert. denied, 506 U.S. 864, 113 S.Ct. 187, 121 L.Ed.2d 131 (1992).

Rule 403 provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed.R.Evid. 403. "Unfair prejudice" means the undue tendency to suggest a decision based on improper considerations; it "does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence." *United States v. Bonds*, 12 F.3d 540, 567 (6th Cir. 1993) (internal quotation marks and citations omitted). Indeed, "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appro-

priate means of attacking shaky but admissible evidence." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, —, 113 S.Ct. 2786, 2798, 125 L.Ed.2d 469 (1993).

Where a decision to exclude evidence on the basis of Rule 403 is overly restrictive such that it precludes a plaintiff from the full opportunity to present his case to a jury, it will be deemed an abuse of discretion. See *West v. Philadelphia Elec. Co.*, 45 F.3d 744, 748 (3d Cir.1995).

We hold that it was an abuse of discretion to exclude an entire category of evidence crucial to plaintiff's claim at the pretrial stage. Apparently, the district court did not even consider the probative value of the proffered notice evidence, the alternative of a jury instruction, or the alternative of ruling on the admissibility of the evidence as the testimony developed in the case. The court, in essence, precluded plaintiff from establishing the elements of three of her causes of action on the basis that the evidence was unfairly prejudicial to the defendants. Offering little analysis for this conclusion, the court's ruling indicates that it may not have appreciated the nature of the evidence and the purpose for which plaintiff was offering it.

The "notice" evidence Doe sought to introduce does not have an undue tendency to suggest a decision on an improper basis as that term is understood under the rule, nor is it related to a collateral matter, nor is it cumulative. What the defendants knew, and when they knew it, is evidence upon which a material issue in this case hinges. That this evidence logically casts the defendants in an unfavorable light is not, ipso facto, a reason to exclude it. All evidence presented by a party opponent, is prejudicial to the other side, to

a greater or lesser degree. The relevant question is whether its probative value is substantially outweighed by its danger of unfair prejudice. This inquiry the court failed to pursue. We therefore reverse the decision to exclude the evidence on the basis of Rule 403.

## VI.

For the reasons explained, we AFFIRM the dismissal of all section 1983 claims, REVERSE the decision dismissing plaintiffs' Title IX claim, REVERSE the decision to exclude the evidence on the basis of Rule 403, and REMAND with instructions that the district court proceed in a manner not inconsistent with this opinion.

ALAN E. NORRIS, Circuit Judge, concurring in part, dissenting in part.

I respectfully dissent from the holding found in Part II of the majority opinion, that plaintiff enjoyed a clearly established fundamental substantive due process right "to personal security and to bodily integrity." I question the wisdom of the majority in placing this court on record as saying that commission of a state law sexual assault crime amounts to a constitutional tort under 42 U.S.C. § 1983. Furthermore, that holding runs contrary to this court's discussion of the question in *United States v. Lanier*, 73 F.3d 1380, 1388-89 (6th Cir. 1996) (en banc).

It follows, then, that I concur in Parts II and III of the opinion to the extent that the majority affirms the dismissal of claims brought under 42 U.S.C. § 1983.

I concur in the balance of the opinion.

RYAN, J., delivered the opinion of the court, in which KRUPANSKY, J., joined.

NORRIS, J. (p. 35), delivered a separate opinion concurring in part and dissenting in part.

MOTION FILED  
AUG 14 1996

No. 95-1717

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1996

UNITED STATES OF AMERICA,

*Petitioner,*

—v.—

DAVID W. LANIER,

*Respondent.*

ON WRIT OF *CERTIORARI*  
TO THE UNITED STATES COURTS OF APPEALS  
FOR THE SIXTH CIRCUIT

**MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE*  
OF THE AMERICAN CIVIL LIBERTIES UNION AND THE  
ACLU OF TENNESSEE IN SUPPORT OF PETITIONER**

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36 pp

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MOTION OF THE AMERICAN CIVIL LIBERTIES  
UNION AND THE ACLU OF TENNESSEE  
FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

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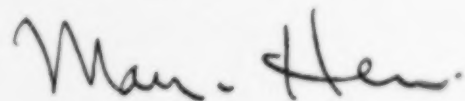
Pursuant to Rule 37.4, the American Civil Liberties Union (ACLU) and the ACLU of Tennessee respectfully move this Court for leave to file the attached brief *amicus curiae* in support of petitioner. Counsel for petitioner has consented to this filing; counsel for respondents has refused to consent.

The American Civil Liberties Union is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members committed to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU of Tennessee is one of its state affiliates.

This case involves issues of critical importance and longstanding interest to the ACLU and its members. The ACLU's Women's Rights Project has fought sex discrimination in the workplace for more than two decades; likewise, the ACLU's Reproductive Freedom Project has vigorously defended the constitutional right to individual autonomy in matters of sexuality, procreation, and family life. Since its inception, the ACLU has also defended the due process rights of criminal defendants, including the essential right to be given fair notice of what conduct is considered a crime.

Because the resolution of this case touches upon all of these issues, we respectfully request leave to file the attached *amicus curiae* brief supporting reversal of the judgment below.

Respectfully submitted,



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Dated: August 13, 1996

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## INTEREST OF *AMICI*

The interest of *amici* is set forth in the accompanying motion for leave to file this brief *amicus curiae*.

## STATEMENT OF THE CASE

Beginning in 1989, the defendant David Lanier, a Tennessee chancery court judge, engaged in a pattern of gross sexual abuse of female employees and litigants that involved a range of physical assaults, including two rapes. Although the Sixth Circuit was divided on its view of the governing law, it was united in its view of defendant's behavior. Chief Judge Merritt's majority opinion described it as "reprehensible." *United States v. Lanier*, 73 F.3d 1380, 1394 n.13 (6th Cir. 1996)(*en banc*). Judge Keith, dissenting, characterized this as "one of the most deplorable cases to come before the Court since I have served on the federal bench." *Id.* at 1399.

Even a brief review of the facts is sufficient to explain this reaction. Sandra Sanders was a youth services officer whom defendant had hired and who was required by her job to consult with defendant on a weekly basis. During one of those meetings in 1989 the defendant grabbed and squeezed Sanders' breasts. Sanders did not complain immediately; she did demand an apology shortly afterwards. In response, Lanier began to complain about her work, and eventually demoted her by removing her supervisory authority. *Id.* at 1404 (Daughtrey, J., dissenting).

In the fall of 1990, the defendant began to grab, touch, and squeeze his secretary, Patty Mahoney, on her breasts and buttocks. The assaults were a daily occurrence, and the defendant would not stop despite Mahoney's protests. On one occasion he offered job privileges if she would have sex with him. The day that Mahoney finally resigned, the de-

fendant lifted her off the floor, slid her body against his, and pressed his pelvis against her. *Id.*

During 1990, the defendant twice orally raped Vivian Archie, who was involved in a custody case in his court. Both of these rapes were brutal and caused Archie physical pain and injury. Using his power over her custody situation and his ability to find her employment, he coerced Archie into returning to his chambers after the first rape. There he sexually assaulted her again by forcing his penis into her mouth, causing her to cry, gag, choke, and partially suffocate. *Id.* at 1405-06.

In March 1991, the defendant (while clothed in judicial robes) assaulted another secretary, Sandy Attaway, by pushing his erect penis against her buttocks in his judicial chambers. When Attaway shouted at him to stop, defendant told her to lower her voice because there were people in the courtroom. Three months later, Attaway was fired because "things were not working out." *Id.* at 1406. After firing her, defendant told Attaway that "they would have gotten along fine if she had liked to have oral sex." *Id.*

In the fall of 1991, the defendant sexually assaulted Fonda Bandy, an employee of a drug free housing initiative, who was meeting with him in the hope that he would refer clients to her program. He grabbed her breasts and crotch, then told her she "would have all the clients that she wanted" if she would return. *Id.* at 1407.

Two points are notable about these incidents. First, Lanier's actions were not ordinary assaults and batteries. His various touchings, grabbings, and rapes were not only physically abusive; they were also distinctly *sexual*. His assaults on these women thus invaded not only their bodily integrity -- but their sexual privacy and autonomy.

Second, these were not ordinary rapes and sexual assaults. All were committed not just under color of law, but

by force of the particular authority of a judge demanding sexual favors in exchange for employment or fair treatment in his court -- essentially requiring that these women prostitute themselves or suffer severe adverse consequences.

The defendant was indicted in eleven counts for violating 18 U.S.C. §242, which makes criminal all willful deprivations of "rights, privileges, or immunities secured or protected by the Constitution or laws of the United States." The "right, privilege, or immunity" on which the government relied was the Fourteenth Amendment's substantive due process guarantee of bodily integrity -- specifically, the right to be free of sexual assault.

The trial court accordingly charged the jury that the right "not to be deprived of liberty without due process of law" includes the "right to be free from willful sexual assault," but that "not every unjustified touching or grabbing by a state official" violates the Constitution. The court instructed that "the physical abuse must be of a serious and substantial nature that involves physical force, mental coercion, bodily injury or emotional damage which is shocking to one's consci[ence]."<sup>1</sup>

---

<sup>1</sup> The entire charge, in relevant part, read:

Each count in this indictment charges the defendant deprived the victim named in that count of her right not to be deprived of liberty without due process of law, specifically her right to be free from willful sexual assault. The Fourteenth Amendment to the Constitution guarantees that no person can be deprived of liberty by the government without due process of law. Included in the liberty protected by the Fourteenth Amendment is the concept of personal bodily integrity and the right to be free of unauthorized and unlawful physical abuse by state intrusion. Thus, this protected right of liberty provides that no person shall be subject to physical or bodily abuse without lawful justification by a state official acting or

(continued...)

The jury convicted Lanier of two felony and five misdemeanor violations of §242. A Sixth Circuit panel affirmed the convictions, but the full court of appeals reheard the case and reversed. *United States v. Lanier*, 73 F.3d 1380. The *en banc* majority, in an opinion by Chief Judge Merritt, ruled that the right to bodily integrity, including freedom from sexual assault, had not been made sufficiently definite by decisions of this Court to fall within the proscriptions of §242, as construed in *Screws v. United States*, 325 U.S. 91 (1945). Indeed, the majority read the history of §242 to reflect a legislative intent contrary to the broad language actually adopted by Congress when it enacted §242. Thus §242 refers on its face to the deprivation of "any rights" protected by the Constitution. Judge Merritt concluded, however, that Congress intended to criminalize only deprivations of "contract, property, and equal protection" rights. 73 F.3d at 1384-87.

<sup>1</sup> (...continued)

claiming to act under the color of the laws of any state of the United States when that official's conduct is so demeaning and harmful under all the circumstances as to shock one's conscious [*sic*]. Freedom from such physical abuse includes the right to be free from certain sexually motivated physical assaults and coerced sexual battery. It is not, however, every unjustified touching or grabbing by a state official that constitutes a violation of a person's constitutional rights. The physical abuse must be of a serious and substantial nature that involves physical force, mental coercion, bodily injury or emotional damage which is shocking to one's conscious [*sic*].

In making this determination, you should consider the nature and the duration of the alleged abuse, the reason or motivation for any physical contact, the context in which the alleged events occurred, intimidation or force, the extent of any injuries and the effect of the defendant's alleged action.

Tr. 1876-77.

Given the explicit holding of *Screws*, see §I, *infra*, the Sixth Circuit majority did acknowledge that §242 also covers rights "specifically stated in the Constitution" and "well-established procedural due process rights like the right to be tried before being punished by law enforcement officers." 73 F.3d at 1392. The majority did not explain how this concession, compelled by *Screws*, could be reconciled with its reading of the legislative history. Furthermore, the majority held the right to be free from sexual abuse by a judge acting in his official capacity had not been made sufficiently specific by prior Supreme Court decisions to support a conviction under §242. 73 F.3d at 1392. The majority thus read out of §242 any possibility that the constitutional rights to which it refers could include bodily integrity. Finally, the majority held that the trial court's reference to a "shocking to the conscience" standard in its jury instructions gave the jurors too much discretion to follow their personal predictions. *Id.* at 1389.

Judges Wellford and Nelson concurred in part and dissented in part. *Id.* at 1394, 1397. Contrary to the majority, they believed that the right to bodily integrity protected individuals against rapes committed by government officers using their governmental powers. As Judge Nelson noted, Vivian Archie "was so clearly deprived of her liberty" through psychological coercion and physical restraint "that the applicability of the statute strikes me as self-evident." *Id.* at 1398. With regard to the five misdemeanor convictions, however, Judges Wellford and Nelson did not believe that the defendant's conduct rose (or sank) to the level of constitutional harm.

Judges Keith, Jones, and Daughtrey dissented. *Id.* at 1399, 1400, 1403. They believed that previous Supreme Court and lower court decisions had sufficiently "made specific," within the meaning of *Screws*, "the right to be free from invasions of bodily integrity that shock the con-

science." *Id.* at 1401 (Jones, J., dissenting). Judge Daugherty argued, in fact, that "[s]exual assault . . . must be considered one of the most blatant and serious invasions of the protected right to bodily integrity." *Id.* at 1412. And she protested the majority's narrow reading of §242's legislative history, arguing that the court "would have us ignore the clear language of the statute." *Id.* at 1408.

### SUMMARY OF ARGUMENT

The majority below erred in holding that deprivations of the constitutional right to bodily integrity can never be prosecuted under 18 U.S.C. §242. Moreover, its interpretation of the legislative history of §242 was inconsistent with this Court's decision in *Screws*. The language of §242 on its face reaches all willful deprivations of constitutional rights if accomplished under color of law. As construed in *Screws*, this means any right "made definite by decision or other rule of law," 325 U.S. at 103. By 1989, the right to be free of coerced sexual assaults by government officers had been made definite through a series of Supreme Court and appellate decisions establishing the contours of sexual privacy and bodily integrity under the Fourteenth Amendment.

The substantive liberty protected by the Due Process Clause of the Fourteenth Amendment has long been understood to encompass bodily integrity and autonomous decisionmaking in the private sphere of family life. Central to the substantive due process concept has been the zone of intimate decisionmaking that encompasses choices about reproduction and sexuality. Accordingly, where the assault is *sexual*, and particularly where sexual favors are demanded by officers sufficiently powerful to coerce those under their control into submission, the right to bodily integrity is violated.

Here, as elsewhere, it is necessary to draw a line between the trivial and the nontrivial. As Judge Friendly said many years ago and, as this Court has repeated many times since, "[n]ot every push or shove" violates the Constitution. *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973). However, the necessity of line drawing is not unique to this context -- juries are often asked to decide whether force is excessive or unreasonable -- and does not, by itself, render a statute unconstitutionally vague.

Once a defendant's conduct has been shown to be serious and substantial, however, the right to be free of sexual acts coerced by government officers should not depend upon whether the officer's conduct "shocks the conscience." Under these circumstances, sexual privacy and bodily integrity are necessarily invaded when a government official makes acquiescence to his grabbings, gropings, or rapes the price of employment or fair treatment in court. Thus, in this case the "shocks the conscience" language in the jury instructions, if anything, imposed an unduly rigorous burden on the prosecution, and helped the defendant. Although "conscience-shocking," standing alone as a legal test, would be troublesome in its vagueness and subjectivity, in this instance the instructions taken as a whole were both specific and accurate, informing the jury that the assaults must be "of a serious and substantial nature" for criminal liability to attach, and enumerating several objective factors for the jury to consider. Like the majority below, this brief focuses on the legal issues and does not take any position on the sufficiency of the evidence.

In addition to violating his victims' sexual privacy and bodily integrity, the defendant also deprived them of their rights under the Equal Protection Clause. That is, Lanier's crimes violated both due process and equal protection guarantees. Although the Justice Department chose to go for-

ward only on a substantive due process theory, this Court should make clear that a pattern of coercive and physically abusive, *quid pro quo* sexual harassment by government officials violates equal protection rights under both 18 U.S.C. §242, if done with specific intent, and 42 U.S.C. §1983.

## ARGUMENT

### I. THE COURT OF APPEALS ERRONEOUSLY NARROWED THE SCOPE OF §242

In *Screws v. United States*, 325 U.S. 91, this Court rejected a vagueness challenge to criminal convictions under 18 U.S.C. §242. It ruled that the statute's broad terms, criminalizing all willful deprivations of "rights, privileges, or immunities secured or protected by the Constitution or laws of the United States," were not unduly vague for two reasons: First, the "rights, privileges, or immunities" in question must be "made definite by decision or other rule of law" before criminal liability can attach, 325 U.S. at 103; second, §242's specific intent or willfulness requirement precluded the statute's being used as "a trap for law enforcement agencies acting in good faith." *Id.* at 104. In other words,

the specific intent required by the Act is an intent to deprive a person of a right which has been made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them.

*Id.*<sup>2</sup>

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<sup>2</sup> Specific intent under *Screws* does not mean that the defendant must have had in mind the precise constitutional provision[s] that he was infringing, but that he "at least act[ed] in reckless disregard of constitu- (continued...)

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For fifty years, therefore, *Screws* has been understood to mean that the broad reach of §242 is adequately cabined, for purposes of fair notice to criminal defendants, by the requirements that they must have specifically intended to deprive their victims of constitutional rights, and that those rights must have been "made definite" by express constitutional language or judicial exposition. As the Sixth Circuit itself explained in *United States v. Epley*, 52 F.3d 571, 576 (6th Cir. 1995), "[o]nce a due process right has been defined and made specific by court decisions, that right is encompassed by §242" (quoting *United States v. Stokes*, 506 F.2d 771, 774-75 (5th Cir. 1975)). See also *Williams v. United States*, 341 U.S. 97, 101-02 (1951) (*Screws* construed §242 closely to avoid vagueness; detectives' coercion of confession was plainly unconstitutional "[w]hatever the school of thought concerning the scope and meaning of the Due Process Clause"); *United States v. Reese*, 2 F.3d at 880-81 (explaining *Screws* in course of affirming §242 convictions of police officers who used excessive force).

The court below implicitly assumed that the notion of evolving constitutional rights is necessarily at odds with the due process requirement that a defendant have notice of what conduct is criminally proscribed. As *Screws* makes clear, however, the vagueness concern under §242 is whether a right has been made sufficiently definite prior to defendant's action. If so, it does not matter whether our understanding of that right has evolved since §242 was enacted. On this latter issue, *Screws* merely embodies a theory of

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<sup>2</sup> (...continued)  
tional prohibitions or guarantees." 325 U.S. at 106. See *United States v. Reese*, 2 F.3d 870, 881, 885 (9th Cir. 1993), *cert. denied*, 114 S.Ct. 928 (1994) (citing *United States v. Ehrlichman*, 546 F.2d 910, 921 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1120 (1977)); *United States v. Dize*, 763 F.2d 586, 588-89 (3d Cir.), *cert. denied*, 474 U.S. 982 (1985).

constitutional interpretation that this Court has embraced at least since *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). That is, although the fundamental principles set out in the Constitution and Bill of Rights do *not* change, our understanding of how those principles apply necessarily evolves with changing social conditions:

[I]n determining whether a provision of the Constitution applies to a new subject matter, it is of little significance that it is one with which the framers were not familiar. For in setting up an enduring framework of government they undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men those fundamental purposes which the instrument itself discloses.

*United States v. Classic*, 313 U.S. 299, 316 (1941). Just as the right to participate in a primary election, at issue in *Classic*, may not have been specifically envisioned by the framers, so in *Screws*, as in the present case, the concept of bodily integrity may have been little developed a century ago but today is understood as a fulcrum of personhood and liberty.

Even more to the point, this Court in *Screws* decidedly did *not* limit the broad reach of §242, as the court of appeals majority apparently thought it should have, to encompass only contract, property, and equal protection rights, or only rights "specifically stated in the Constitution." The Sixth Circuit majority ignored both the holding and reasoning of *Screws*, as well as the plain language of §242, when it read bodily integrity and freedom from sexual assault out of the statute's reach. Instead, the court mistakenly imposed a rigidly narrow interpretation on §242 that essentially negates any evolution in judicial understanding of the "rights, privileges, or immunities secured or protected by the Consti-

tution or laws of the United States." This approach is not only inconsistent with *Screws* and *United States v. Price*, 383 U.S. 787, 793, 803 (1966), but it violates the first rule of statutory construction: fidelity to the actual language of a law. See, e.g., *Bourjaily v. United States*, 483 U.S. 171, 178-79 (1987); Norman J. Singer, 2A SUTHERLAND STATUTORY CONSTRUCTION §46.01 (5th ed. 1992); *Lanier*, 73 F.3d at 1408 (Daughtrey, J., dissenting)(citing *United States v. Winters*, 33 F.3d 720, 721 (6th Cir. 1994)(Merritt, C.J.), *cert. denied*, 115 S.Ct. 1148 (1995)). If, as the Sixth Circuit majority thought, Congress passed §242 inadvertently and really only intended the law to apply to property, contract, and equal protection rights, Congress has had more than 100 years in which to amend the statute to correct its "error."

The Sixth Circuit went on to rule that, even assuming a right to bodily integrity was potentially within the broad terms of §242, it had not been "made definite" within the meaning of *Screws* because no Supreme Court decisions on fundamentally similar facts could be found. 73 F.3d at 1392, 1393 ("[a]s we interpret the 'make specific' requirement, the Supreme Court must not only enunciate the existence of a right, it must also hold that the right applies to a factual situation fundamentally similar to the one at bar"). The majority erroneously rejected the dissenters' contentions that *Screws* permits consideration of lower court precedents, and that a right has been made definite when its contours and underlying principles are judicially articulated even if no judge has yet penned a decision that is "on all fours" factually (or close to it) with the case at hand.

Regarding the level of judicial authority needed to "make definite" a constitutional right, there is some force to the majority's contention that relying on lower court decisions risks different rules in different circuits. But the alternative -- refusing to remedy constitutional violations of

criminal magnitude until the Supreme Court has ruled in a case with similar facts -- creates a far more serious problem of underenforcement. And this is especially so in egregious cases. For, as Judge Nelson explained, requiring a Supreme Court decision on "fundamentally similar" facts would lead to the anomalous result that, for example, government officials "could acquire by prescription a right to make sex slaves of litigants or prospective litigants," 73 F.3d at 1399, simply because the Supreme Court had not been presented with that fact situation.<sup>3</sup>

More importantly, however, existing Supreme Court precedents have established the contours of the substantive due process right to sexual privacy and bodily integrity, and appellate decisions from a variety of circuits have specified that the right encompasses freedom from sexual coercion by government officers. See §II, *infra*. *Screws*' "made definite" standard does not demand factual identity so long as a reasonable state actor would be on notice that his conduct invaded constitutional rights as explicated in relevant precedents. Cf. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) ("clearly established" standard for 42 U.S.C. §1983 qualified immunity determinations does not require that "the very act in question has previously been held unlawful," but only that "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right . . . . [I]n the light of pre-existing law the unlawfulness must be apparent"). Here, Supreme Court and appellate decisions prior to 1989 put Lanier on notice that his grossly oppressive practice of forcing himself

<sup>3</sup> See also *Doe v. Taylor Independent School Dist.*, 15 F.3d 443, 455 (5th Cir.)(*en banc*), *cert. denied*, 115 S.Ct. 70 (1994)("[t]here has never been a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages liability")(quoting *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846, 851 (7th Cir. 1990)).

sexually on employees and litigants subject to his official powers violated their constitutional rights to bodily integrity and sexual privacy.

## II. THE FOURTEENTH AMENDMENT RIGHT TO BODILY INTEGRITY, "MADE DEFINITE" WELL BEFORE 1989, INCLUDES THE RIGHT TO BE FREE OF SEXUAL ASSAULT AND RAPE COERCED BY GOVERNMENT OFFICIALS AS THE PRICE OF A JOB OR THE CUSTODY OF ONE'S CHILD

This Court recognized as early as *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), that the "liberty" protected by the Due Process Clause has substantive as well as procedural elements. *Meyer* and *Pierce* established that fundamental decisions about childrearing and family life were part of that substantive liberty. In *Rochin v. California*, 342 U.S. 165 (1951), the Court added the right of bodily integrity or autonomy to the concept of substantive due process. Although *Rochin* itself involved the use of unconstitutionally obtained evidence in a criminal trial, its substantive due process/bodily integrity holding has formed the basis for civil rights actions at least since *Johnson v. Glick*, 481 F.2d 1028. See, e.g., *Wilson v. Northcutt*, 987 F.2d 719, 722 (11th Cir. 1993); *Maldonado v. Josey*, 975 F.2d 727, 730-31 (10th Cir. 1992), *cert. denied*, 113 S.Ct. 1266 (1993); *Stoneking v. Bradford Area School Dist.*, 882 F.2d 720, 726-27 (3d Cir. 1989)(*en banc*), *cert. denied*, 493 U.S. 1044 (1990)("Stoneking II"); *Shillingford v. Holmes*, 634 F.2d 263, 265 (5th Cir. 1981).<sup>4</sup>

<sup>4</sup> Many post-*Johnson v. Glick* cases would now be litigated under the Fourth Amendment's "reasonableness" standard (for pre-arrest investiga-  
(continued...)

This Court's more recent decisions have emphasized that the substantive liberty protected by the Fourteenth Amendment embraces both bodily integrity and sexual self-determination. These cases have established protection for decisionmaking about intimate aspects of private life, including reproduction, marriage, and living choices. See *Griswold v. Connecticut*, 381 U.S. 479, 481-82 (1965); *id.* at 499-500 (Harlan J., concurring)(marital privacy); *Loving v. Virginia*, 388 U.S. 1, 12 (1967)(choice of mate); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)(sexual privacy for individuals, married or single); *Roe v. Wade*, 410 U.S. 113 (1973)(reproductive choice); *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977)(living arrangements; sanctity of extended family); *Carey v. Population Services, Int'l*, 431 U.S. 678, 684-86 (1977)(reproductive autonomy). As the Court summarized the doctrine in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 847-51 (1992), there is a "realm of personal liberty which the government may not enter"; this encompasses "basic decisions about family and parenthood . . . as well as bodily integrity," and "intimate and personal choices . . . central to personal dignity and autonomy."<sup>5</sup> See also *Albright v. Oliver*,

<sup>4</sup> (...continued)

tory seizures), or the Eighth Amendment's Cruel and Unusual Punishment Clause (for post-conviction excessive force claims). See *Graham v. Connor*, 490 U.S. 386, 396 & n.10 (1989); *Whitley v. Albers*, 475 U.S. 312, 327 (1986). Post-arrest but pre-conviction brutality claims continue to be analyzed under the Due Process Clause, see *Graham*, 490 U.S. at 396 n.10, as do excessive force claims where the government officers' pre-arrest conduct does not amount to a seizure. See *Bella v. Chamberlain*, 24 F.3d 1251, 1257 (10th Cir. 1994), cert. denied, 115 S.Ct. 898 (1995); *Landol-Rivera v. Cruz Cosme*, 906 F.2d 791, 796 (1st Cir. 1990); *Wilson v. Northcutt*, 987 F.2d at 722.

<sup>5</sup> Even under the view of substantive due process articulated by this Court in *Bowers v. Hardwick*, 478 U.S. 186, 191-92 (1986), the right to (continued...)

510 U.S. \_\_\_, \_\_\_, 114 S.Ct. 807, 812 (1994)(substantive due process embraces matters relating to "marriage, family, procreation, and the right to bodily integrity").<sup>6</sup>

As *Casey* and *Albright* make clear, the core of substantive due process as it has developed since *Meyer* and *Pierce* is the set of privacy rights revolving around marriage, family, reproduction, bodily integrity, and sexuality. It follows that when "serious and substantial" physical assaults by government officers are explicitly sexual (whether the grabbing be of female breasts, male genitals, or the buttocks of either sex), the Fourteenth Amendment's substantive liberty is doubly implicated. That is, the invasion of bodily integrity is compounded by the violation of sexual autonomy. Moreover, unlike nonsexual coercion, which may sometimes be justified by dangerous circumstances or unruly suspects, there is never a justification for a government officer to force himself sexually on individuals subject to his official power and control.

Thus, in *Doe v. Taylor Independent School Dist.*, 15 F.3d at 455, the court of appeals found that sexual miscon-

<sup>5</sup> (...continued)

be free from serious sexual abuse committed by government officials is surely "implicit in the concept of ordered liberty," and "deeply rooted in the Nation's history and tradition."

<sup>6</sup> The Court meanwhile has continued to recognize that physical brutality, excessive confinement, and forced medical interventions, whether or not sexual in nature, may also violate substantive due process. See *Graham v. Connor*, 490 U.S. at 396 n.10 (excessive force in non-seizure or post-seizure situations remains subject to Due Process Clause); *Ingraham v. Wright*, 430 U.S. 651, 673 (1977)(corporal punishment implicates due process); *Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982) (involuntary confinement); *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 278 (1990)(medical self-determination); *Washington v. Harper*, 494 U.S. 210, 221-22 (1990)(forced drug treatment).

duct by a public school teacher violated his student's due process rights "to be free from sexual abuse and violations of her bodily integrity" and, furthermore, that those rights were clearly established in 1987. As the Fifth Circuit explained: "No reasonable public school official in 1987 would have assumed that he could, with constitutional immunity, sexually molest a minor student." *Id.* Unlike corporal punishment, which invades bodily integrity but does not always amount to a constitutional violation (or even a tort), there is no legitimate basis for a state actor to inflict physical sexual injury on a child, and never has been. *Id.* at 461 (Higginbotham, J., concurring).

Similarly, *Stoneking II*, 882 F.2d at 726-27, upheld a due process claim against a public school teacher and supervisory officials for repeated sexual assaults on a student.<sup>7</sup> Like the Fifth Circuit in *Doe*, the Third Circuit in *Stoneking II* held that the plaintiff's constitutional right to "freedom from invasion of her personal security through sexual abuse, was well-established at the time the assaults upon her occurred" in 1980-85. *Id.* at 726. Indeed, given that sexual molestation of a student is never justified, the court found that her due process right was established under the bodily integrity standard of *Rochin* -- well before *Ingraham v. Wright*, 430 U.S. 651, announced that corporal punishment of public school students also implicated the Fourteenth Amendment. *Stoneking II*, 882 F.2d at 727. See also *Searles v. Septa*, 990 F.2d 789, 794 (4th Cir. 1993)(unlike claim based on governmental negligence, right to be free of

<sup>7</sup> The teacher allegedly "fondled and kissed [a student's] breasts, inserted his fingers into her vagina, exposed himself to her and forced her to handle his genitals, and occasionally compelled her to have oral sex." *Stoneking v. Bradford Area School Dist.*, 856 F.2d 594, 599 n.8 (3d Cir. 1988)(*"Stoneking I"*), vacated on other grounds, 489 U.S.1062 (1989).

sexual coercion was well-established by 1980s); *Maldonado v. Josey*, 975 F.2d at 730-31 (same).

There is no reason to believe that the right recognized in these cases for public school students is not equally applicable to victims of sexual coercion by law enforcement officers or judges. Although minors are generally more vulnerable than adults, the coercive effect may in fact be greater in some circumstances where the target of sexual demands by government officers is an adult. A police officer's or prison guard's physical ability to overpower a victim, or a judge or other government officer's power to control employment, entitlements, or legal outcomes, may -- as the present case makes clear -- produce an effect even more dramatic and intimidating than a public school officer's sexual victimization of a pupil.

In any event, the due process right to be free of sexual coercion by state actors other than teachers seemed sufficiently self-evident by the 1980s that the appellate courts simply assumed it in *United States v. Davila*, 704 F.2d 749 (5th Cir. 1983)(affirming the criminal conviction of immigration officers for coercing sexual favors), and *United States v. Brummett*, 786 F.2d 720 (6th Cir. 1986)(affirming sentence on conviction for conspiracy to commit sexual assault). See also *United States v. Contreras*, 950 F.2d 232 (5th Cir. 1991), cert. denied, 504 U.S. 941 (1992)(affirming §242 conviction of police officer for sexual assault and other crimes); *Bennett v. Pippin*, 74 F.3d 578, 589 (5th Cir. 1996), cert. pending on other grounds, \_\_\_ U.S. \_\_\_, 65 U.S.L.W. 3088 (Aug. 6, 1996)(assuming, based on *United States v. Classic*, 313 U.S. 299, and *Doe v. Taylor Independent School Dist.*, 15 F.3d 443, that district court correctly ruled that sheriff's rape of criminal suspect violated suspect's "substantive due process right to bodily integrity").

In other nonschool contexts, appellate courts have spe-

cifically recognized freedom from sexual coercion as the basis for constitutional claims under 42 U.S.C. §1983, the civil analog to §242. *Dang Vang v. Vang Xiong X. Toyed*, 944 F.2d 476, 479 (9th Cir. 1991), affirmed a §1983 judgment against a state official who used his governmental powers to coerce sexual favors from immigrants and thus violated "their constitutional right to be free from sexual assault." In *Canedy v. Boardman*, 16 F.3d 183, 185 (7th Cir. 1994), the court of appeals held that a male inmate had stated a §1983 claim for invasion of privacy and bodily integrity based on strip searches by female guards. See also *Gilson v. Cox*, 711 F.Supp. 354, 356 (E.D.Mich. 1989)(male prisoner stated due process/bodily integrity claim against female guard who allegedly grabbed his genitals and buttocks on several occasions).

In sum, coerced sex under color of official authority, whether amounting to oral rape as in the case of Vivian Archie, or to required submission to sexual assaults as a condition of employment, as in the case of Lanier's other victims, was by 1989-91 a well-established violation of the constitutional rights of sexual autonomy and bodily integrity.

### III. ALTHOUGH A "SHOCKING TO THE CONSCIENCE" INSTRUCTION, STANDING ALONE, WOULD BE TOO VAGUE TO SUPPORT A CRIMINAL CONVICTION, THE TRIAL COURT'S CHARGE ON THE RIGHT TO BODILY INTEGRITY WAS SUFFICIENTLY SPECIFIC AND DETAILED TO GUIDE THE JURY'S DELIBERATIONS

This Court and others have sometimes described deprivations of the right to bodily integrity in terms of conduct that is "arbitrary or conscience-shocking," *Collins v. Harker*

*Heights*, 503 U.S. 115, 128 (1992); see also *Rochin*, 342 U.S. at 172, or that sufficiently "offend[s] those canons of decency and fairness which express the notions of justice of English-speaking peoples . . ." *Id.* at 169. In 1973, Judge Friendly adopted the *Rochin* "shocks the conscience" language as a standard that "points the way" toward determining when excessive force by government officers amounts to a due process violation, *Johnson v. Glick*, 481 F.2d at 1033, although he also articulated specific factors to guide a court or jury in making the judgment.<sup>8</sup> Courts have used these *Johnson* factors, or variants, in excessive force cases ever since -- though less frequently since *Graham v. Connor* and *Whitley v. Albers* held that many such claims would now be adjudicated under the Fourth or Eighth Amendments rather than the Fourteenth. See n.4, *supra*.

In *Collins v. Harker Heights*, this Court referred interchangeably to conduct that is "conscience-shocking" or "arbitrary in a constitutional sense" in rejecting a substantive due process claim based on negligent maintenance of municipal facilities, 503 U.S. at 128. But the Court's unanimous opinion did not make clear whether government conduct must necessarily "shock the conscience" in order to violate any aspect of the Due Process Clause. See the debate between the Third Circuit majority and dissent on this point in *Fagan v. City of Vineland*, 22 F.3d 1296, 1303-05 (3d Cir. 1994)(*en banc*)(maintaining that *Collins* explicitly adopted a

<sup>8</sup> The oft-quoted language from *Johnson* reads: "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights. In determining whether the constitutional line has been crossed, a court must look to such factors as the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically for the very purpose of causing harm." 481 F.2d at 1033.

"shocks the conscience" test for substantive due process claims, or at least those involving physical injuries); *id.* at 1309-13 (Cowen, Becker, Scirica & Lewis, JJ., dissenting)(arguing that the Supreme Court has never established the *Rochin* "shocks the conscience" "catch phrase" as a necessary element of substantive due process violations). Certainly, though, for claims arising out of the Fourteenth Amendment liberty interests in marriage, sexual privacy, and reproductive freedom, there has never been a "shocks the conscience" limitation on the scope of substantive due process rights.<sup>9</sup>

There can be little question that a legal standard that allowed juries to impose criminal liability based solely on whether the defendant's conduct "shocks the conscience" would raise very serious constitutional issues. In a case where that was the sum total of the jury's instructions, there would be much force to Judge Merritt's concern that the standard is too vague and subjective to provide individuals with fair notice, or juries with sufficient guidance, as to where the lines of criminal liability should be drawn under §242. See *Graham v. Connor*, 490 U.S. at 392-94; *Gumz v. Morrisette*, 772 F.2d 1395, 1407 (7th Cir. 1985), *cert. denied*, 475 U.S. 1123 (1986)(Easterbrook, J., concurring) ("shocks the conscience" . . . is a vague standard -- if it can be called a 'standard' at all -- inviting decisionmakers to consult their sensibilities rather than objective circumstances");<sup>10</sup> *Lanier*, 73 F.3d at 1389 ("[s]hocks the con-

<sup>9</sup> The same is true of the Fourteenth Amendment liberty interests in medical autonomy and freedom from involuntary confinement. See n.6, *supra*.

<sup>10</sup> *Gumz*, which applied a variant of the *Johnson v. Glick* factors to an excessive force/arrest claim, was overruled on the basis of *Graham v. Connor* in *Lester v. City of Chicago*, 830 F.2d 706 (7th Cir. 1987).

science' is too indefinite to give notice of a crime").<sup>11</sup> Indeed, in *Rochin* itself, two justices, while agreeing that the state's conduct in the case was unconstitutional, criticized the looseness of the language used by the majority. See 342 U.S. at 174 (Black, J., concurring); *id.* at 177 (Douglas, J., concurring).

But in this case, the "shocks the conscience" language in the jury instruction is not a basis to reverse the convictions, for two reasons. First, it did not stand alone; it merely modified in two places a charge that was otherwise sufficiently detailed and objective to guide the jury. The instruction, taken as a whole as it must be,<sup>12</sup> adequately charged the jurors that not "every unjustified touching or grabbing by a state official" violates the Constitution, and that they could not convict unless they found the defendant's abuse to be "of a serious and substantial nature that involves physical force, mental coercion, bodily injury, or emotional damage . . ." See n.1, *supra*. Moreover, the court enumerated five objective factors (some of them variants on the factors set out in *Johnson v. Glick*) for the jurors to consider in deciding whether Lanier's sexual assaults were indeed "of a serious and substantial nature."<sup>13</sup> *Id.*

<sup>11</sup> See also *Kolender v. Lawson*, 461 U.S. 352, 358 (1983); *Bouie v. City of Columbia*, 378 U.S. 347, 362-63 (1964).

<sup>12</sup> See *Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973); *United States v. Reese*, 2 F.3d at 883 ("the district court's formulation of [the elements of a statutory crime] is reviewed for abuse of discretion . . . . An abuse of discretion in this context occurs where the jury instructions taken as a whole are misleading or inadequate to guide the jury's deliberations"); *Martin v. Thomas*, 973 F.2d 449, 454 (5th Cir. 1992)("[o]n appeal, we review the charge as a whole and reverse only if the jury is misled as to the substantive law").

<sup>13</sup> The jurors were told to consider "the nature and the duration of the al-

(continued...)

This type of instruction is typical in constitutional cases, and is no more vague than instructions that delineate for juries the standards and factors to consider in determining whether a search or seizure is "reasonable" or whether prison officials' actions violate "contemporary standards of decency"; see *Hudson v. McMillian*, 503 U.S. 1, 8 (1992) (quoting *Estelle v. Gamble*, 429 U.S. 97, 103 (1976)). The fact that juries must draw lines in virtually all cases involving constitutional rights does not invalidate their judgments so long as the instructions as a whole give them accurate and sufficient guidance with respect to the essential elements of the crime.<sup>14</sup> See *Baker v. Delo*, 38 F.3d 1024, 1026 (8th Cir. 1994)(no plain error in jury instruction on excessive force); *United States v. Reese*, 2 F.3d at 880-87 (upholding specific intent and excessive force instructions); *United States v. Bigham*, 812 F.2d 943, 948-49 (5th Cir. 1987)(rejecting challenge to jury charge in §242 assault prosecution where excessiveness was not an issue because no force was justified under the circumstances); *United States v. Dise*, 763 F.2d at 589-92 (affirming sufficiency of §242 charge on willfulness and freedom from bodily restraint). Compare *Romano v. Howarth*, 998 F.2d 101, 106

<sup>13</sup> (...continued)

leged abuse, the reason or motivation for any physical contact, the context in which the alleged events occurred, intimidation or force, the extent of any injuries and the effect of the defendant's alleged action." Tr. 1877.

<sup>14</sup> This does not mean, of course, that in some cases a judgment could not be reversed for insufficient evidence -- a decidedly different matter than invalidating a jury charge or the constitutional standard it articulates. Because the majority below rejected the prosecution's reliance on a substantive due process theory, it never addressed the sufficiency of the evidence. Nor does this brief. However, if the jury charge in this case is sustained, then it is also fair to assume that the jury found that defendant's conduct was both willful, and sufficiently serious and substantial, to justify conviction on 7 out of 11 counts in the indictment.

(2d Cir. 1993)(instruction on defendants' state of mind in Eighth Amendment excessive force case which simply told jury to "look to all the surrounding circumstances" did not give adequate guidance).<sup>15</sup>

Second, the "shocks the conscience" language added to the instruction in this case helped rather than hurt the defendant by *narrowing* the range of bodily invasions or sexual assaults for which he could be convicted. Read in context, as it must be, the "shocks the conscience" reference was plainly intended to reinforce the notion, stated earlier in the same sentence, that defendant's conduct was required to be "serious and substantial" in order to violate the right of bodily integrity, and that this requirement was not to be taken lightly. Because the "shocking to one's conscience" modifier at the end of the instruction on bodily integrity reduced rather than expanded the likelihood of conviction, Lanier cannot credibly complain about it; indeed, he did not even object to the instruction at trial, perhaps for precisely this reason. For the future, trial courts might be well advised to avoid the "conscience-shocking" language altogether in jury instructions, certainly where sexual coercion is involved; but in this case, its inclusion is hardly grounds for reversal.<sup>16</sup>

<sup>15</sup> For typical jury instructions in civil rights cases, see 2 Devitt, Blackmar & O'Malley, FEDERAL JURY PRACTICE AND INSTRUCTIONS §27.07 (4th ed. 1987 & Supp. 1996)(criminal cases); and 3 Devitt, Blackmar & Wolff, FEDERAL JURY PRACTICE AND INSTRUCTIONS §§103.01-.08 (4th ed. 1987 & Supp. 1996)(civil cases). As the Court in *Reese* points out, constitutional standards articulated in §1983 civil suits may appropriately be used in §242 criminal cases, 2 F.3d at 884; see also *United States v. Bigham*, 812 F.2d at 948 (though level of culpable intent varies, same substantive standard applies to deprivation of rights under §1983 and §242).

<sup>16</sup> If the Court believes that the instruction, taken as a whole, does require reversal, then remand for a new trial rather than dismissal of the charges is the appropriate remedy.

#### IV. THE DEFENDANT'S ACTIONS ALSO VIOLATED THE EQUAL PROTECTION CLAUSE

Although the Justice Department prosecuted Lanier only on substantive due process grounds, and cannot change its theoretical horses in midstream, this Court should make clear that on the facts as found by the jury, Lanier's conduct also constituted sexual harassment in violation of the Equal Protection Clause. Physically abusive, *quid pro quo* sexual harassment, particularly of the repellent and persistent nature manifested in this case, undoubtedly constitutes sex discrimination. See *Harris v. Forklift Systems, Inc.*, 510 U.S. \_\_\_, \_\_\_, 114 S.Ct. 367, 370-71 (1993); *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64 (1986). Putting aside differences not relevant here, the standard for sex discrimination is fundamentally the same whether under 42 U.S.C. §2000e, the statute at issue in *Harris* and *Vinson*, or under the Equal Protection Clause.<sup>17</sup>

This Court has repeatedly recognized that constitutional rights are not limited to one per customer. See *Soldal v. Cook County*, 506 U.S. 56, 70 (1992)("[c]ertain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands"); *United States v. James Daniel Good Real Property*, 510 U.S. \_\_\_, \_\_\_, 114 S.Ct. 492, 499 (1993)("[w]e have rejected the view that the applicability of one constitutional amendment preempts the guarantees of another"). The only exception to this principle appears to be where, as in *Graham v. Connor*,

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<sup>17</sup> See, e.g., *Annis v. County of Westchester*, 36 F.3d 251, 254 (2d Cir. 1994); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1478-79, 1483 & n.4 (3d Cir. 1990); *Starrett v. Wadley*, 876 F.2d 808, 814 (10th Cir. 1989). For 42 U.S.C. §1983 sexual harassment cases before 1989, see *Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988); *Bohen v. City of East Chicago*, 799 F.2d 1180 (7th Cir. 1986); and other cases cited in *Starrett*, 876 F.2d at 814.

490 U.S. 386, a specific constitutional provision sets an objective standard of conduct (there, "reasonableness") to guide government officials, which is preferable to the less definitive and objective standard underlying substantive due process. See *Albright v. Oliver*, 114 S.Ct. at 820 (Souter, J., concurring).

In the present case, however, in contrast to *Graham*, two wholly separate constitutional principles give rise to two wholly separate types of constitutional harm. Lanier's assaults and demands for sex as a condition of employment or fair treatment in court violated the women's personal autonomy in the most intimate part of their lives, see §II, *supra*, but they also deprived the women of their ability to work or otherwise interact with government officials free of sex-discriminatory hostility and abuse. The latter rights are dignitary rather than physical; they relate to fairness, equality, and economic opportunity rather than sexual privacy and bodily harm. They have fundamentally different constitutional roots and thus form a separate ground for liability under equal protection principles.

### CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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Dated: August 14, 1996

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No. 95-1717

Supreme Court, U.S.  
FILED

AUG 15 1996

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1996

UNITED STATES OF AMERICA,

*Petitioner,*

—v.—

DAVID W. LANIER,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SIXTH CIRCUIT

**MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND  
BRIEF *AMICI CURIAE* OF NOW LEGAL DEFENSE AND  
EDUCATION FUND, ANTI-DEFAMATION LEAGUE, AYUDA,  
INC., CENTER FOR WOMEN POLICY STUDIES, CONNEC-  
TICUT WOMEN'S EDUCATION AND LEGAL FUND, INC.,  
THE DC RAPE CRISIS CENTER, JEWISH WOMEN INTER-  
NATIONAL, NATIONAL ALLIANCE OF SEXUAL ASSAULT  
COALITIONS, NATIONAL COUNCIL OF JEWISH WOMEN,  
NATIONAL ORGANIZATION FOR WOMEN FOUNDATION,  
INC., NATIONAL WOMEN'S LAW CENTER, NORTHWEST  
WOMEN'S LAW CENTER, PEOPLE FOR THE AMERICAN  
WAY, VIRGINIANS ALIGNED AGAINST SEXUAL ASSAULT,  
WOMEN'S LAW PROJECT, AND WOMEN'S LEGAL  
DEFENSE FUND IN SUPPORT OF PETITIONER**

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**MOTION FOR LEAVE TO FILE  
BRIEF AMICI CURIAE**

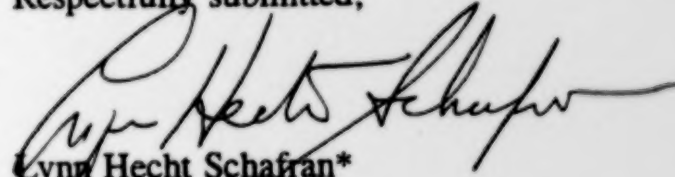
The NOW Legal Defense and Education Fund and other public interest organizations listed in the Appendix to the attached brief ("amici") hereby respectfully move for leave to file the attached brief amici curiae in support of Petitioner in this case. The consent of the Solicitor General, attorney for Petitioner, has been obtained. The consent of the attorney for Respondent was requested but refused.

The interest of the amici in this case arises from the fact that they are public interest organizations that consistently support the cause of equal justice for women before the courts. The brief amici propose to file supplements the arguments raised by the Solicitor General and other amici in their briefs. Specifically, the brief provides: an analysis of the history and breadth of the constitutionally protected right to bodily integrity showing why it clearly encompasses the right to be free from sexual assault by state actors; a discussion of this Court's jurisprudence on rape in relevant contexts; important information regarding the impact of sexual assault on victims; and discussion of the federal interest in prosecuting acts of rape and sexual assault committed under color of law. Amici believe that the brief will provide this Court with a more complete argument concerning the scope of the constitutional protections provided by 18 U.S.C. § 242.

In light of the foregoing, amici submit that the attached brief will assist this Court in its deliberations in this case.

Therefore, we respectfully urge the Court to permit the brief to be filed.

Respectfully submitted,



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## INTEREST OF AMICI CURIAE

Amici curiae, a group of women's and civil rights organizations and sexual assault advocates, file this brief in support of Petitioner. Amici are all organizations with an interest in ensuring fair and equal justice for women, including the proper use of our nation's civil rights laws against abuses of power that deprive women of their constitutionally-protected rights. Specific statements of interest from the amici curiae are included as an Appendix.

## STATEMENT OF THE CASE

Amici adopt and here summarize for the Court the facts as stated in Petitioner's brief, in the panel opinion below, United States v. Lanier, 33 F.3d 639, 645-50 (6th Cir. 1994), and in the dissenting opinions in the en banc decision below, United States v. Lanier, 73 F.3d 1380, 1394-1414 (6th Cir. 1996) (en banc).

As described in the panel opinion, Respondent was a Tennessee Chancery Court Judge with extensive local political power and family connections. 33 F.3d at 646. He used the authority of his office to perpetrate multiple criminal sexual assaults on a female litigant and four female court employees who held their jobs utterly subject to his authority to hire and fire them. 33 F.3d at 645. All of these assaults took place in Respondent's chambers, in some cases while he was wearing his judicial robe. 33 F.3d at 653.

The assaults on the court employees included aggressively grabbing and squeezing their breasts and buttocks, see, e.g., 33 F.3d at 647, rubbing up against them with his erect penis, see, e.g., 33 F.3d at 649, and

grabbing one victim's crotch. 33 F.3d at 650. The litigant was subjected to forcible oral rape on two separate occasions after Respondent, who had continuing jurisdiction over her custody award, made statements easily interpreted as a threat to take away her child. 33 F.3d at 647-48. In those two incidents, Respondent grabbed the litigant's hair and neck, forced her jaws open, forced his penis into her mouth and ejaculated. 33 F.3d at 648. Respondent threatened to, and did, retaliate against victims who did not cooperate or who disclosed what he had done to them. See 33 F.3d at 646-49. Respondent's victims did not report him to state authorities for fear of his political power. See 73 F.3d at 1400 (Keith, J., dissenting); 33 F.3d at 646, 649, 650.

Respondent was convicted of seven counts of sexual assault under 18 U.S.C. § 242, and his conviction was upheld by a three-judge panel of the Sixth Circuit. 33 F.3d 639. A sharply divided en banc court dismissed the indictment. 73 F.3d 1380.

### SUMMARY OF ARGUMENT

A majority of the Sixth Circuit Court of Appeals, sitting en banc, has refused to remedy a clear constitutional violation shocking to the conscience of this nation. Defying truths that this Court has long held to be self-evident, the Circuit Court ruled that a state judge who rapes and sexually assaults women who are in his chambers on official business cannot be indicted under 18 U.S.C. § 242 because this Court has never specifically stated that such

conduct violates the constitutional right to bodily integrity.<sup>1</sup>

Despite the Sixth Circuit's erroneous conclusion, extensive precedent supports prosecutions under § 242 for sexual assault committed under color of law. This Court's prior decisions demonstrate that the liberty interest protected by the Due Process Clause forbids violations of bodily integrity. Numerous lower courts have held that state officials who use the power of their office to commit rape and sexual assault violate that right to bodily integrity.

Rape and sexual assault violate victims' bodily integrity because they constitute extreme physical violations with traumatic psychological impact. This Court's own descriptions of the experience of rape leave no doubt that this violation is vastly more injurious than the "simple" or "common" assaults to which the Sixth Circuit and Respondent analogize Respondent's conduct. The research on the impact of sexual assault on victims supports the accuracy of this Court's characterizations of the psychological consequences of rape, which also extend to victims of sexual assault short of rape.

Using 18 U.S.C. § 242 to punish a sitting judge who misused his authority to commit multiple instances of criminal sexual assault that violated his victims' bodily integrity vindicates the strong federal interest in preventing assaults by state officials that deprive individuals of their constitutional rights. This federal remedy ensures that a

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<sup>1</sup> 18 U.S.C. § 242 provides that "[w]hoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . shall be fined under this title or imprisoned . . ."

perpetrator of constitutional crimes does not go unpunished, notwithstanding local biases and genuine barriers to enforcing laws against powerful local officials such as Respondent. Most important, prosecuting Respondent's actions as civil rights violations and constitutional deprivations recognizes their severity.

Because the right to bodily integrity encompassing freedom from sexual assault by a state actor is protected by the Fifth and Fourteenth Amendments, and because this had been made specific at the time of Respondent's predations, we ask this Court to reverse the decision of the court below, which dismissed Judge Lanier's indictment under 18 U.S.C. § 242.

## ARGUMENT

### I. LONGSTANDING PRECEDENT LEAVES NO DOUBT THAT SEXUAL ASSAULT UNDER COLOR OF LAW CONSTITUTES STATE INTERFERENCE WITH BODILY INTEGRITY AND IS PROSCRIBED BY THE DUE PROCESS CLAUSE

A long line of decisions of this Court unequivocally holds that state interference with bodily integrity violates the liberty interest protected by the Due Process Clause of the Constitution. As numerous lower courts have found to be beyond question, state actors who commit rape and sexual assault can be held accountable for violating bodily integrity under civil and criminal civil rights laws. Contrary to the Sixth Circuit's assertions, *e.g.*, 73 F.3d at 1388, this case law is more than sufficient to make freedom from sexual assault "specific" within the meaning of *Screws v. United States*, 325 U.S. 91, 104 (1945).

The unqualified right to bodily integrity is deeply rooted in the common law. More than one hundred years ago, in *Union Pacific Railway Co. v. Botsford*, 141 U.S. 250 (1891) (upholding trial court's refusal to order surgical examination of woman injured in railway car accident), this Court recognized the common law right to bodily integrity. Justice Gray explained in *Botsford* that "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." 141 U.S. at 251.<sup>2</sup>

Subsequent to *Botsford*, this Court has located the right to bodily integrity in the Constitution, subsumed under rights to privacy and personhood guaranteed in the "liberty interest" secured by the Due Process Clause of the Fifth and Fourteenth Amendments. In a foundational due process case, *Rochin v. California*, 342 U.S. 165 (1952), this Court held that forcibly pumping a criminal suspect's stomach flagrantly violates his bodily integrity because it "shocks the conscience." *Id.* at 172. Justice Frankfurter explained that the factual scenario presented a clear due process violation:

Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there,

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<sup>2</sup> *Botsford* has been cited in recent case law as authority supporting the general right to bodily integrity. See *Planned Parenthood v. Casey*, 505 U.S. 833, 926 (1992) (drawing on *Botsford* in reaffirming "the long recognized rights of privacy and bodily integrity"); *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (citing *Botsford* to support proposition that Fourth Amendment protects the "inestimable right of personal security"); *Stadt v. University of Rochester*, 921 F. Supp. 1023, 1027 (W.D.N.Y. 1996) (stating that right to bodily integrity is "a right which has been recognized throughout this nation's history").

the forcible extraction of his stomach's contents--this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.

Id. If extracting morphine from a suspect's stomach "shocks the conscience" of this Court, then surely this case where a judge acting under color of law<sup>3</sup> committed acts of rape and criminal sexual assault is equally unconscionable.

Reaffirming these due process principles, this Court in Ingraham v. Wright, 430 U.S. 651 (1977), found a constitutional violation of bodily integrity in a different context: disciplinary corporal punishment in schools. There the Court observed that

[a]mong the historic liberties so protected was a right to be free from and to obtain judicial relief, for unjustified intrusions on personal security. While the contours of this historic liberty interest in the context of our federal system of government have not been defined precisely, they always have been thought to encompass freedom from bodily restraint and punishment.

430 U.S. at 673-74, citing Rochin, 342 U.S. 165 (footnotes omitted).

Courts following both Ingraham and Rochin have uniformly recognized what Judge Martha Craig Daughtrey termed the "seemingly axiomatic principle that a citizen's right not to be deprived of life, liberty, or property without

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<sup>3</sup> See infra Section III.

due process of law encompasses the right not to be intentionally and sexually assaulted under color of law." Lanier, 73 F.3d at 1411 (Daughtrey, J., dissenting).<sup>4</sup> In Stoneking v. Bradford Area School District, 882 F.2d 720 (3d Cir. 1989), cert. denied, 493 U.S. 1044 (1990), for example, the Third Circuit Court of Appeals held that a teacher's sexual assault upon a student constituted a violation of her constitutional rights giving rise to civil liability under 42 U.S.C. § 1983.<sup>5</sup> The court maintained that "[a] teacher's sexual molestation of a student is an intrusion of the schoolchild's bodily integrity" and therefore a constitutional violation. 882 F.2d at 726. Similarly, the Fifth Circuit Court of Appeals, in Doe v. Taylor Independent School District, 15 F.3d 443 (5th Cir.) (en banc), cert. denied, 115 S. Ct. 70 (1994), another § 1983 case, held that when a teacher sexually molested a student, the teacher deprived her of her liberty interest protected under the Fourteenth Amendment. The court explained,

If the Constitution protects a schoolchild against being tied to a chair or against arbitrary paddlings, then surely the Constitution protects a schoolchild from physical sexual abuse . . . . It is incontrovertible that bodily integrity is necessarily violated when a state

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<sup>4</sup> As Judge Daughtrey also points out in her dissent, Screws clearly established that decisions from lower courts are "a source of reference for ascertaining the specific content of the concept of due process." 73 F.3d at 1409 (Daughtrey, J., dissenting) (citing Screws, 325 U.S. at 96).

<sup>5</sup> As discussed at pp. 10-12, an act that constitutes a constitutional violation under § 1983 also constitutes a constitutional violation under § 242. Because Stoneking was decided well before the events at issue in this case, constitutional protection of the right to be free from sexual assault by a state actor was sufficiently "made specific" within the meaning of § 242.

actor sexually abuses a schoolchild and that such misconduct deprives the child of rights vouchsafed by the Fourteenth Amendment.

15 F.3d at 451-52.<sup>6</sup> District courts addressing this issue also in the context of sexual molestation in schools have agreed that there is a firmly established constitutional right to bodily integrity that encompasses protection from sexual assault by a state actor. *See, e.g., Knackert v. Estes*, 926 F. Supp. 979, 984 (D. Nev. 1996); *Bolon v. Rolla Pub. Schs.*, 917 F. Supp. 1423, 1431 (E.D. Mo. 1996); *Plumeau v. Yamhill County Sch. Dist.*, 907 F. Supp. 1423, 1435 (D. Ore. 1995); *Does v. Covington County Sch. Bd.*, 884 F. Supp. 462, 466 (M.D. Ala. 1995); *Wilson v. Webb*, 869 F. Supp. 496, 497 (W.D. Ky. 1994); *Doe "A" v. Special Sch. Dist.*, 637 F. Supp. 1138, 1143-45 (E.D. Mo. 1986). Indeed, before this case, no court considering whether sexual assault by a state actor violates constitutional rights under either § 242 or § 1983 reached a contrary conclusion.

In addition to many circuit and district court decisions arising from cases of sexual abuse in schools, other cases establishing that sexual assault by a state official acting under color of law constitutes a constitutional violation offer fact patterns more closely resembling the instant case. In *Wedgeworth v. Harris*, 592 F. Supp. 155 (W.D. Wis. 1984), for example, a woman brought a § 1983 action to recover for sexual assault by an on-duty police officer. The court explained that the "plaintiff was allegedly threatened with prosecution if she did not consent to sexual intercourse with [defendant] and . . . she allegedly feared for her

<sup>6</sup> Accord *Doe v. Hillsboro Indep. Sch. Dist.*, 81 F.3d 1395, 1402 (5th Cir.), *reh'g en banc granted*, 1996 U.S. App. LEXIS 15741 (June 17, 1996); *Doe v. Rains County Indep. Sch. Dist.*, 66 F.3d 1402, 1406 (5th Cir.), *reh'g denied*, 1995 U.S. App. LEXIS 34713 (Oct. 31, 1995).

personal safety if she refused his advances." 592 F. Supp. at 156. Identifying a flagrant violation of constitutional rights under color of law, the court "entertain[ed] no doubt that an on-duty police officer who uses his position to exert pressure on an unwilling victim so as to force her into sexual intercourse has violated that person's constitutional rights under color of State law." *Id.* at 159. Ruling that bodily integrity is a vital liberty interest guaranteed by the Fourteenth Amendment, the court explained that sexual assault by an on-duty police officer is "at least as offensive to conscience and justice" as the state-induced vomiting at issue in *Rochin v. California*. *Id.* at 160.

This extensive body of case law demonstrates that the constitutional right to freedom from sexual assault by a state official is uncontroverted. This right is so self-evident and axiomatic that, in what are to *amici's* knowledge the only two circuit court decisions involving criminal prosecutions for sexual assault committed under color of law, the Fifth Circuit Court of Appeals did not consider it necessary to question whether sexual assault falls within the reach of § 242. *See United States v. Contreras*, 950 F.2d 232 (5th Cir. 1991); *United States v. Davila*, 704 F.2d 749 (5th Cir. 1983).<sup>7</sup>

These cases thus make clear that the Sixth Circuit majority errs in insisting that no case recognizes the right to be free from sexual assault under color of law "as a

<sup>7</sup> Numerous trial courts have permitted such prosecutions in cases where state actors such as police, border patrol, and correctional officers pled guilty to or were convicted at trial of a § 242 violation for sexual assault on women vulnerable to their authority. *See* Southern Poverty Law Center *Amici Curiae* Brief Pet. Cert. App. In two cases, judges pled guilty to § 242 violations for misdemeanor level sexual assaults on women. *Id.* at 1.

component of an enforceable general constitutional right to 'bodily integrity.'" 73 F.3d at 1388. Indeed, the very concept of a "liberty interest" is devoid of meaning if it does not protect against conduct which this Court has described as "[s]hort of homicide . . . the 'ultimate violation of self.'" Coker v. Georgia, 433 U.S. 584, 597 (1977).<sup>8</sup> Even the most restrained application of due process must recognize the right to freedom from state interference with bodily integrity in the form of sexual assault.

The Sixth Circuit brushes aside these numerous precedents establishing that sexual assault by state officials is a constitutional deprivation on the grounds that these cases could not make the right "specific" because they were brought under 42 U.S.C. § 1983, rather than 18 U.S.C. § 242. See 73 F.3d at 1388, 1393. The majority's attempt to fundamentally distinguish between prohibited conduct under § 1983 and § 242 is clearly unsupported, and was flatly rejected by the original three-judge panel. 33 F.3d at 652 n.3.

As cited by the three-judge panel, several other circuit courts have made it clear that § 1983 and its criminal analog § 242 recognize identical rights and proscribe identical conduct. In United States v. Reese, 2 F.3d 870, 884 (9th Cir. 1993), cert. denied, 114 S. Ct. 928 (1994), for example, the Ninth Circuit observed that "[t]here is nothing wrong with looking to a civil case brought under 42 U.S.C. § 1983 for guidance as to the nature of the constitutional right whose alleged violation has been made the basis of a section 242 charge." Accord United States v. Bigham, 812 F.2d 943, 948 (5th Cir. 1987), reh'g en banc

<sup>8</sup> See infra Section II.

denied, 816 F.2d 677 (1987); see also United States v. Schatzle, 901 F.2d 252, 254-55 (2d Cir. 1990) (upholding jury instructions under § 242 that relied on standard set by § 1983 case). Indeed, the legislative history of § 242 indicates that it is a parallel statute to § 1983.<sup>9</sup> As Judge Nathaniel R. Jones wrote in his dissent,

Once a right has been made a definite and specific part of the body of Fourteenth Amendment due process rights, a willful violation of that right comes within the purview of section 242. United States v. Stokes, 506 F.2d 771, 776 (5th Cir. 1975) (relying on both criminal and civil cases to hold the right to be free from injury while in police custody had been made specific).

73 F.3d at 1402 (Jones, J., dissenting).<sup>10</sup>

Evidently, the Sixth Circuit would only be satisfied with a decision from this Court involving an identical factual scenario and brought under the same statute. See 73 F.3d at 1392-93.<sup>11</sup> Fortunately, this Court has never

<sup>9</sup> See Cong. Globe, 42nd Cong., 1st Sess. App 38 (explaining that "[t]he model for [§ 242] will be found in . . . the 'civil rights act,'" referring to an earlier version of § 1983), cited in Monroe v. Pape, 365 U.S. 167, 185 (1961).

<sup>10</sup> The Sixth Circuit en banc opinion also insists that the standard for notice is "substantially higher" under 18 U.S.C. § 242 than under 42 U.S.C. § 1983, but the court offers no support for its assertion. See 73 F.3d at 1393.

<sup>11</sup> Indeed, as Judge David A. Nelson wrote in his opinion, "if the majority opinion is correct in the conclusion it draws from the absence of direct Supreme Court precedent, I am not sure that I understand how such a question could ever reach the Supreme Court in the first place." 73 F.3d at 1399 (Nelson, J., concurring in part and dissenting in part).

encountered facts as egregious as those found here. Other courts have agreed, however, that the very notion that the constitutional right to freedom from sexual assault by a state actor is not definitively established is absurd. In Stoneking, the Third Circuit Court of Appeals found it "ludicrous" even to have to inquire whether it was permissible under § 1983 for school teachers and staff to sexually molest students: "Reasonable officials would have understood the 'contours' of a student's right to bodily integrity, under the Due Process Clause, to encompass a student's right to be free from sexual assaults by his or her teachers." 882 F.2d at 726-27. The Third Circuit had no trouble finding that the constitutional right to be free from sexual assault by state actors was clearly defined in 1988. This Court should have no trouble reaching the same conclusion.

## II. SEXUAL ASSAULT VIOLATES BODILY INTEGRITY BECAUSE IT IS A PROFOUND PERSONAL VIOLATION WITH A UNIQUELY TRAUMATIC IMPACT ON ITS VICTIMS

This Court's pronouncements on the traumatic impact of rape, and medical and social science literature buttressing those pronouncements and extending them to sexual assault short of rape, demonstrate that sexual assault by public officials is conduct that shocks the conscience and violates its victims' bodily integrity. This Court has repeatedly acknowledged the seriousness of rape in terms that leave no doubt that when a state actor is involved, it is a violation of constitutional dimensions. In Coker v. Georgia, 433 U.S. 584 (1977), for example, although holding that the death penalty for rape is disproportionate and excessive punishment violating the Eighth Amendment, the plurality refused to "discount the seriousness of rape as

a crime." 433 U.S. at 597. This Court described rape as a violation of personal integrity, a conscience-shocking offense:

It is highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim and for the latter's privilege of choosing those with whom intimate relationships are to be established. Short of homicide, it is the '*ultimate violation of self*.'

<sup>12</sup>

Id. at 497-98 (emphasis added) (footnotes omitted). Justice Powell, in a separate opinion, echoed the plurality's view on rape, adding that some rapes are as life-destructive as murder. He explained that "[t]he deliberate viciousness of the rapist may be greater than that of the murderer. . . . Some victims are so grievously injured physically or psychologically that life is beyond repair." Id. at 603 (Powell, J., concurring in the judgment and dissenting in part).

The dissent in Coker, written by Chief Justice Burger and joined by then Justice Rehnquist, argued that because rape is such a horrific, traumatizing crime, as the plurality readily conceded, it warrants the death penalty. Chief Justice Burger and Justice Rehnquist stated that "rape is inherently one of the most egregiously brutal acts one human being can inflict upon another." 433 U.S. at 607-08 (Burger, C.J., dissenting). They posited that rape "is not a crime 'light years' removed from murder in the degree of

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<sup>12</sup> Recently, in The Florida Star v. B.J.F., 491 U.S. 524, 542 (1989), Justices White and O'Connor and Chief Justice Rehnquist quoted Coker in declaring that "[s]hort of homicide, [rape] is the 'ultimate violation of self.'" (White, J., joined by Rehnquist, C.J., and O'Connor, J., dissenting).

its heinousness; it certainly poses a serious potential danger to the life and safety of innocent victims apart from the devastating psychic consequences.” *Id.* at 620 (Burger, C.J., dissenting). Chief Justice Burger and Justice Rehnquist also described rape as a profound violation of personal integrity:

A rapist not only violates a victim’s privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. The long-range effect upon the victim’s life and health is likely to be irreparable; it is impossible to measure the harm which results. . . . *Rape is not a mere physical attack -- it is destructive of the human personality.*

*Id.* at 611-12 (Burger, C.J. dissenting) (emphasis added). Although the *Coker* Court was fiercely divided over whether the death penalty is an appropriate punishment for rape, every Justice agreed that rape is infinitely more damaging to the victim than a mere “physical attack.”

This Court has recognized the unique devastation of rape in other contexts as well. For example, in *Michigan v. Lucas*, 500 U.S. 145 (1991) (upholding state rape-shield statute against Sixth Amendment challenge), this Court maintained that the notice-and-hearing requirement of Michigan’s rape-shield statute “represents a valid legislative determination that rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy.” *Id.* at 150. This Court also acknowledged the calamitous effects of rape in *Farmer v. Brennan*, 511 U.S. 825, 114 S. Ct. 1970, 1987 (1994), stating that “[p]rison rape . . . is potentially devastating to the human spirit. Shame, depression, and a shattering loss of self-esteem, accompany the perpetual terror the victim

thereafter must endure.”

Of course, it is not just rape in prison that devastates the human spirit. As the *Coker* dissent observed, “[v]olumes have been written by victims, physicians and psychiatric specialists on the lasting injury suffered by rape victims.” 433 U.S. at 612 (Burger, C.J., dissenting). These volumes document that rape, in any circumstance, is a brutal experience with lifetime implications.<sup>13</sup> The vast majority of rape victims suffer a form of Post-Traumatic Stress Disorder often referred to as “rape trauma syndrome.”<sup>14</sup> Victims suffer nightmares, flashbacks, disorientation, dissociation, sleep and appetite disturbances, constant reliving of the rape, shock, disbelief, helplessness, powerlessness, guilt, self-blame, loss of self-esteem, uncontrollable crying, extreme fear, hypervigilance, anxiety attacks, psychic numbing, fatigue, shame, internalized sense of damage, sexual dysfunction, depression, and suicidal

<sup>13</sup> See generally Crime Victims Research and Treatment Center, *Rape in America: A Report to the Nation* 7-8 (1992) (hereinafter *Rape in America*); Judith L. Herman, *Trauma and Recovery* 57-58 (1992); Lenore E. A. Walker, *Abused Women and Survivor Therapy* 23-53 (1994); Lynn Hecht Schafran, *Writing and Reading About Rape: A Primer*, 66 St. John’s L. Rev. 979, 1017-26 (1993); Lynn Hecht Schafran, *Maiming the Soul: Judges, Sentencing and the Myth of the Nonviolent Rapist*, 20 Fordham Urb. L.J. 439, 443-47 (1992).

<sup>14</sup> See, e.g., Ann Burgess & Lynda Holmstrom, *Rape Trauma Syndrome*, 131 Am. J. Psychiatry 981, 982 (1974) (coining the term); Edna Foa & David Riggs, *Posttraumatic Stress Disorder Following Assault: Theoretical Considerations of Empirical Findings*, 4 Current Directions in Psychol. Sci. 61, 63 (1995); Barbara O. Rothbaum & Edna B. Foa, *Subtypes of Posttraumatic Stress Disorder and Duration of Symptoms*, in *Posttraumatic Stress Disorder: DSM-IV and Beyond* 23, 26, 29 (Jonathan R. T. Davidson & Edna B. Foa eds., 1993).

thoughts and actions.<sup>15</sup> Many try to ease their psychological pain with alcohol and drugs.<sup>16</sup>

Psychological studies demonstrate the long-term trauma of rape and why it is so profound a violation of bodily integrity. Six months after being raped, the majority of victims still experience what one researcher called a distinct "core of distress."<sup>17</sup> Another study documents that at fifteen to thirty months after being raped, more than forty percent of victims still suffered depression, restricted social interaction, sexual dysfunction, suspicion, and fears.<sup>18</sup> Three years after the rape, a variety of psychological symptoms persist, leading researchers to believe that many victims never recover completely. In one study of victims raped an average of fifteen years before the research began, 16.5 percent still had symptoms of Post-Traumatic Stress Disorder.<sup>19</sup>

In their Coker dissent, Chief Justice Burger and Justice Rehnquist observed that "[v]ictims may recover from the physical damage of knife or bullet wounds, or a

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<sup>15</sup> See, e.g., Walker, supra, at 30-40; Burgess & Holstrom, supra, at 982-85.

<sup>16</sup> See Rape in America, supra, at 7-8.

<sup>17</sup> Dean G. Kilpatrick et al., The Aftermath of Rape: Recent Empirical Findings, 49 Am. J. Orthopsychiatry 658, 668 (1979).

<sup>18</sup> See Karla Fischer, Defining the Boundaries of Admissible Expert Psychological Testimony on Rape Trauma Syndrome, 1989 U. Ill. L. Rev. 691, 706 (citing Nadelson et al., A Follow-Up Study of Rape Victims, 139 Am. J. Psychiatry 1266, 1268 table 2 (1982)).

<sup>19</sup> Dean G. Kilpatrick et al., Criminal Victimization: Lifetime Prevalence, Reporting to Police, and Psychological Impact, 33 Crime & Delinq. 479 (1987).

beating with fists or a club, but recovery from such a gross assault on the human personality [as rape] is not healed by medicine or surgery." 433 U.S. at 612 (Burger, C.J., dissenting).<sup>20</sup> Indeed, the impact of rape is like an invisible permanent disability. Rape relentlessly affects victims' daily lives, their work and school work, and their family and social relationships.<sup>21</sup> As the Medical University of South Carolina wrote in its comprehensive national study, Rape in America, "The fact that 13% of all rape victims have actually attempted suicide confirms the devastating and potentially life-threatening impact of rape."<sup>22</sup>

Rape by a state actor causes harm of constitutional magnitude whether or not the victim bears physical scars. A critical but little known aspect of rape victim impact is that the physical brutality of a sexual assault is not what determines the severity of victim impact. Rape by someone

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<sup>20</sup> For an example of another court that rightly acknowledged the critical difference between physical and sexual assault, see Doe "A" v. Special Sch. Dist., 637 F. Supp. 1138, 1145 (E.D. Mo. 1986) (§ 1983 case stating that school bus driver's sexual assaults on handicapped students "intrude in ways more personal and private than a jailhouse beating and in ways which will surely leave psychological scars long after physical healing is complete").

<sup>21</sup> One woman said ten years after her rape, "How can I expect to marry when I'm too frightened to go on a date?" Someone You Know: Acquaintance Rape (Dystar Television 1986) (documentary film about women raped by boyfriends or friends).

<sup>22</sup> Rape in America, supra, at 7.

known to the victim,<sup>23</sup> particularly, as in the instant case, someone standing in a position of authority and trust, is uniquely destructive.<sup>24</sup> Women raped by someone they know often have a more difficult time recovering than women raped by a stranger. Victims of nonstranger rape are more likely to keep their rape secret because of guilt and shame, more likely to be blamed by themselves and others, and less likely to believe themselves deserving of sympathy and professional help. Victims of physically brutal sexual assaults may have less long-lasting traumatic effects from the assault, relatively speaking, because their visible injuries produce more comfort and support, and less suspicion of false accusation and victim precipitation from the police, hospital personnel, family, and friends.

Moreover, a state actor committing rape in any of its various forms causes a constitutional deprivation. The term "rape" in the popular mind and until recently in the law, traditionally meant penile-vaginal penetration only. In the instant case, one victim was subjected to forcible oral rape on two separate occasions. Modern state statutes provide that rape is any sexual assault that involves forced penetration--that is, vaginal, anal, oral, digital (or other

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<sup>23</sup> Contrary to the stereotype of rape as a crime committed by a stranger jumping from the bushes, the vast majority of sexual assaults are committed by someone known to the victim. According to Rape in America, only 22% of forcible rapes and sexual assaults are committed by strangers. Rape in America, *supra*, at 4.

<sup>24</sup> See, e.g., Sedelle Katz & Mary Ann Mazur, Understanding the Rape Victim: A Synthesis of Research Findings 108 (1979); Sally I. Bowie et al., Blitz Rape and Confidence Rape: Implications for Clinical Intervention, 64 Am. J. Psychotherapy 180 (1990) (explaining that "blitz rape" is a "sudden surprise attack by an unknown assailant" and "confidence rape" involves "some nonviolent interaction between the rapist and victim before the attacker's intention to commit rape emerges").

body part) and object rape. Patricia Searles & Ronald J. Berger, The Current Status of Rape Reform Legislation: An Examination of State Statutes, 10 Women's Rts. L. Rep. 25 (Spring 1987). See, e.g., 18 U.S.C. § 2246 (1988); Ariz. Rev. Stat. Ann. § 13-1401 (West 1989); Minn. Stat. Ann. § 609.342 (West 1992); Tenn. Code Ann. § 39-13-503 (Supp. 1995). Of these several types of sexual assault, Dr. Nicholas Groth, one of the country's most prominent experts in the field, has written:

[F]rom a clinical . . . point of view, it makes more sense to regard rape as any form of forcible sexual assault, whether the assailant intends to effect intercourse or some other type of sexual act. There is sufficient similarity in the factors underlying all types of forcible sexual assault--and in the impact such behavior has on the victim--so that they may be discussed meaningfully under the single term of rape.

A. Nicholas Groth, Men Who Rape: The Psychology of the Offender 3 (1979).

Two of the judges writing separately below stated that they would only uphold Respondent's felony count convictions, not the misdemeanor counts. 73 F.3d at 1394 (Wellford, J., concurring in part and dissenting in part); *id.* at 1397-98 (Nelson, J., concurring in part and dissenting in part). This distinction runs counter to the sentencing scheme for § 242, which clearly encompasses a continuum of constitutional violations, including misdemeanors and felonies. Deprivations of constitutional rights that result in bodily injury or death, or involve the use of weapons, kidnapping, or aggravated sexual abuse, constitute a felony, while all other deprivations are punishable as misdemeanors. 18 U.S.C. § 242. Congress has viewed the statute's modern range of penalties as "graduated in

accordance with the seriousness of the *results* of violations." S. Rep. No. 721, 40th Cong., 1st Sess. (1967), reprinted in 1968 U.S.C.C.A.N. 1839, 1841 (emphasis added) (discussing 1968 amendments to penalty provisions).<sup>25</sup> Drawing lines between different types of sexual assault in a case involving the deprivation of constitutional rights misperceives the gravity of the consequences of *all* types of sexual assaults for the victims.

Women victimized by sexual assault short of rape, such as the misdemeanor counts in this case which include Respondent's aggressively grabbing and squeezing the victims' breasts and buttocks, see, e.g., 33 F.3d at 647, rubbing up against them with his erect penis, see, e.g., 33 F.3d at 649, and grabbing one victim's crotch, 33 F.3d at 650, also experience these assaults as a serious violation of their bodily integrity and suffer the same psychological injuries as rape victims. One study of the psychological consequences of criminal victimization that differentiated between types of sexual assault found that seventy-one percent of victims of completed rape and forty-two percent of victims of "completed molestation" experienced Post-Traumatic Stress Disorder.<sup>26</sup> Kilpatrick et al., supra, at 487.

Another study of the psychological consequences for

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<sup>25</sup> Sexual assault short of rape, the conduct at issue in the misdemeanor counts here, has been found to deprive victims of their constitutionally protected liberty interest. See, e.g., Doe "A", 637 F. Supp. at 1145.

<sup>26</sup> Completed molestation is defined in the study as "actual sexual contact involving assailant's touching the victim's breasts or pubic area or making the victim touch his penis." Dean G. Kilpatrick et al., *The Psychological Impact of Crime: A Study of Randomly Surveyed Crime Victims* 12 (Mar. 1987) (NIJ Grant No. 84-IJ-CX-0039).

women subjected to unwanted physical sexual contact in the workplace examined twenty-five women, one of whom was orally raped while the others experienced varying degrees of unwanted sexual contact short of rape. All but one of these women were diagnosed with Post-Traumatic Stress Disorder, some form of Depressive Disorder, or both. Louise F. Fitzgerald et al., *Borderline or Traumatized? The Psychological Antecedents and Consequences of Sexual Harassment (and) Litigation* (paper presented to the Annual Conference of the Association for Women in Psychology, Mar. 14-17, 1990) and Letter from Louise F. Fitzgerald to Lynn Hecht Schafran, Senior Staff Attorney, NOW LDEF (July 23, 1996) (on file with the NOW LDEF).

Federal courts have recognized that unwanted sexual contact that does not involve bodily injury, and that may appear minor, is in fact deeply serious. For example, in Jordan v. Gardner, 986 F.2d 1521 (9th Cir. 1993) (en banc), the Ninth Circuit Court of Appeals held that clothed body searches of female prisoners by male guards constituted cruel and unusual punishment, because of the painful psychic trauma to a number of inmates of being forced to endure male guards touching their breasts and crotch area. Id. at 1525-26. The Ninth Circuit credited the testimony of expert witnesses that "differences in gender socialization would lead to differences in the experiences of men and women with regard to sexuality," id. at 1526, and observed:

We do not chart new territory in upholding the district court's finding that men and women may experience unwanted intimate touching by members of the opposite gender differently. In the Title VII context, we concluded:

[B]ecause women are disproportionately victims of

rape and sexual assault, women have a stronger incentive to be concerned with sexual behavior. . . . Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive.

986 F.2d at 1526 n.5 (quoting *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991)). In sum, all of Respondent's conduct is serious, criminal, and a constitutional violation of bodily integrity, because of both its character and its impact on the victims.<sup>27</sup>

Despite this massive evidence of the uniquely traumatic character of rape and sexual assault, Respondent describes his actions as "common assaults with no apparent constitutional implications," (Opp'n Pet. Cert. at 4) repeatedly refers to his sexual attacks as mere "physical assaults," *id.* at 3, 4, and likens his crimes to "the conduct of a judge who beat up a lawyer in a barroom brawl." *Id.* at 4. The Sixth Circuit compares Respondent's sexual predations to "simple" assault. *See, e.g.*, 73 F.3d at 1387. Unlike simple assault, sexual assault is a gross personal violation. For that reason, criminal statutory schemes distinguish between sexual assault and physical assault. *Compare, e.g.*, 18 U.S.C. §113 *with* 18 U.S.C. §§2241 *et seq* (West 1996); N.Y. Penal Law § 120.00 *et seq with* N.Y. Penal Law § 130.20 *et seq* (McKinney's 1996). Apart from the patent inaccuracy of Respondent's and the Sixth Circuit's characterizations, their persistent conflation of

<sup>27</sup> The jury found all of Respondent's conduct, including the misdemeanors to be "physical abuse. . . of a serious and substantial nature that involve[d] physical force, mental coercion, bodily injury or emotional damage which is shocking to the conscience." 33 F. 3d at 652.

sexual assault and simple assault trivializes and demeans the pain and suffering of Respondent's victims and deliberately ignores the constitutional magnitude of the sexual assaults.<sup>28</sup>

### III. WHERE RESPONDENT'S ACTS OF RAPE AND SEXUAL ASSAULT ARE CLEARLY COMMITTED UNDER COLOR OF LAW, § 242 IS THE ONLY ADEQUATE REMEDY TO VINDICATE THE FEDERAL INTEREST IN ENSURING PROTECTION OF HIS VICTIMS' RIGHTS

By specifically targeting individuals who misuse their legal authority to deprive others of constitutional rights, § 242 serves a vital national interest in uniform enforcement of federal law, and protects individuals from abuses committed by officials of state governments. Applying § 242 to acts of sexual assault committed under color of law vindicates the purpose of the statute, as well as furthers the national interest in preventing all forms of violence against women.

There is a strong national interest in ensuring that all

<sup>28</sup> The intent of Respondent and the Sixth Circuit to downplay the seriousness of Respondent's conduct is apparent not only in their misleading use of the terms "common" and "simple assault," *see, e.g.*, Opp'n Pet. Cert. at 3, 4; 73 F.3d at 1394, but also in their wholly inappropriate use of the term "sexual harassment," *see, e.g.*, Opp'n Pet. Cert. at 1; 73 F.3d at 1382, to describe Judge Lanier's sexual assaults. Although sexual harassment is serious and damaging conduct which can include physical contact legally cognizable as sexual assault, it is a civil law term which includes non-contact abuse. The grand jury indictment alleges that Respondent sexually assaulted his victims under color of law in violation of 18 U.S.C. § 242; the indictment bears no mention whatsoever of "sexual harassment."

women are free from civil rights deprivations that take the form of rape and sexual assault, whether committed by state officials or by others. The Violence Against Women Act ("VAWA"), recent federal legislation addressing the national epidemic of sexual assault, domestic violence and other forms of violence against women, and extending federal civil rights protections to acts of sexual and other forms of gender-based violence committed by private individuals,<sup>29</sup> only underscores the gravity and national importance of this issue. Pub. L. No. 103-322, Title IV, codified at 42 U.S.C. §§13931 et seq. (1994).<sup>30</sup> In passing this legislative package, Congress expressed obvious concern over the shocking rates of violence against women and the inadequacy of existing state remedies, as documented in a voluminous legislative record covering

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<sup>29</sup> The VAWA's civil rights remedy guarantees all citizens the right to be free from gender-based violence. 42 U.S.C. § 13981 (1994) (the "Civil Rights Remedy"). The Civil Rights Remedy provides a private cause of action in federal court: "a person. . . who commits a crime of violence motivated by gender and thus deprives another of the right [to be free from gender-motivated violence] shall be liable to the party injured." Id.

<sup>30</sup> In passing the VAWA and granting a civil remedy, Congress clearly did not mean to supplant existing federal civil rights remedies. Senate Comm. on the Judiciary, The Violence Against Women Act of 1993, S. Rep. No. 103-138, 103d Cong., 1st Sess. 53 (1993) (hereinafter 1993 Senate Report). Indeed, Congress recognized § 242 and other federal hate crimes statutes as one element of the VAWA's comprehensive scheme. In the omnibus crime bill that included the VAWA, Congress passed the Hate Crimes Sentencing Enhancement Act, which increases penalties under § 242 and other federal criminal civil rights statutes, 18 U.S.C. §§ 241, 245, and 247, for civil rights violations that include aggravated sexual abuse. Pub. L. 103-322, § 320103, 108 Stat. 2109 (1994).

four years of hearings and committee reports.<sup>31</sup> Although the VAWA civil rights provision targets private civil rights violations, efforts to use § 242 to prosecute sexual violence committed by public officials under color of law reflect this heightened federal concern with preventing violence against women.<sup>32</sup>

Prosecutions of public officials under § 242 also further the federal interest in uniform application of the laws. State officials may be reluctant to take action against someone of authority in the community. Only a federal civil rights law such as § 242 can ensure that a combination of local biases, disparities of power, and limitations of state law remedies does not allow these perpetrators to go unpunished.

In this case, Respondent's position and family connection to the local prosecutor's office made state law remedies all but useless. Respondent was a judge, and he and his family members had "occupied positions of power and political authority in Dyersburg, Dyer County, Tennessee, for several generations." 73 F.3d at 1394 (Wellford, J., concurring in part and dissenting in part). In addition, Respondent was the only judge in the county, 33 F.3d at 645, and had particular power over almost all matters of family law and other common areas of litigation. 73 F.3d at 1403 (Daughtrey, J., dissenting). Had the

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<sup>31</sup> See, e.g., 1993 Senate Report at 37-50; Violent Crime Control and Law Enforcement Act of 1994, H.R. Conf. Rep. No. 103-711, 103d Cong., 2d Sess. 385-86 (1994) (hereinafter 1994 Conference Report).

<sup>32</sup> As discussed supra, federal prosecutors have used this statute to prosecute sexual assault under color of law. See, e.g., Contreras, 950 F.2d 232; Davila, 704 F.2d 749; lower court and unreported cases discussed in the appendix to the amici brief of the Southern Poverty Law Center and others. Southern Poverty Law Center Amici Curiae Brief App.

victims in the instant case tried to pursue state law charges against Respondent, query whether his brother, the local prosecutor, would have pursued this case,<sup>33</sup> or whether this small, tightly-knit community could have been immune to local biases and stereotypes.<sup>34</sup> The majority opinion below makes a grievous error by suggesting that state law provides adequate remedy for Respondent's crimes, *see, e.g.*, 73 F.3d at 1393 n.12, 1394 n.13, despite the demonstrated inadequacy of state law remedies in this case.

Finally, applying § 242 to Respondent's conduct furthers the most "traditional" area of federal interest -- preventing constitutional violations committed under the auspices of the state. *United States v. Price*, 383 U.S. 787, 806 (1966). The Reconstruction Congress adopted the original statutes, which now exist in the modern § 242 and

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<sup>33</sup> Indeed, Judge Lanier's predations only came to light as a result of an unrelated Federal investigation by the United States Attorney and the FBI into potential political corruption involving Respondent and his brother. Darcy O'Brien, *The Power to Hurt* (1996) (documenting the entire history of the investigation and prosecution of this case).

<sup>34</sup> This is not just a possible problem in investigating a powerful judge in Dyersburg, Tennessee, but a national problem in prosecuting rape and sexual assault generally. In passing the VAWA, Congress specifically found compelling evidence that bias against women continues to infect every facet of the criminal justice system and that crimes disproportionately affecting women, including rape and sexual assault, are taken less seriously. 1993 Senate Report, *supra*, at 49. Police, prosecutors, juries and judges routinely subject female victims of rape and sexual assault to a wide range of unfair and degrading treatment that contributes to the low rates of reporting and conviction that characterize these crimes. *Id.* at 44-46; *see also* 1994 Conference Report, *supra*, at 385. Numerous witnesses testified that stereotypes like "she asked for it," "she made it up" or "no harm was done" are commonplace. Senate Comm. on the Judiciary, *The Violence Against Women Act of 1991*, S. Rep. No. 102-197, 102d Cong., 1st Sess. 39 (1991) (citations omitted).

other laws, in order to "uproot" the "abuse of basic civil and political rights" by states and their officials that was so prevalent at the time. *Screws*, 325 U.S. at 116 (Rutledge, J., concurring); *see also Price*, 787 U.S. at 278-79. When those entrusted to enforce the law abuse that power to commit gross constitutional violations, victims must look to federal civil rights law for a remedy.

Prosecuting Respondent's conduct under § 242 fits squarely within the purposes of the statute. Respondent used his authority as a judge to commit violent and degrading acts of rape and sexual assault against women particularly vulnerable to his state authority, and then used that same power to intimidate his victims into silence.<sup>35</sup> In 1941, this Court recognized the relationship between the defendant's power and his or her ability to commit a constitutional violation, in defining action taken under color of law as "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law," *United States v. Classic*, 313 U.S. 299, 326, *reh'g denied*, 314 U.S. 707 (1941). Respondent's position as a judge gave him the

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<sup>35</sup> Although it is not an issue before the court, Respondent continues to press the patently absurd contention that § 242 should not be applied because his conduct was "personal" and "private," *Opp'n Pet. Cert.* at 3-4, and not conducted under color of law. The majority opinion below did not address this ground for reversal. The original three-judge panel resoundingly rejected this argument. 33 F.3d at 653. Besides attempting to hide behind the myth that rape and sexual assault are "private" matters unworthy of police, prosecutorial, or other criminal justice intervention, this argument ignores the law and the plain facts.

ability to prey on his victims.<sup>36</sup>

As a chancery court judge, Respondent apparently had sole authority to hire and fire his victims who were court employees; in the case of the litigant he raped, he had the power to take away her child. 33 F.3d at 647-49. The victims were present in the judge's chambers because they worked for him, they were applying for a job, they were making a work-related presentation, or they had litigation matters pending before him. 33 F.3d at 645-46. As the original three-judge panel explained in rejecting the argument that Respondent was not acting under color of law, "all of the assaults took place in defendant's chambers during working hours, and during each assault, there was at least an aura of official authority and power. . . . Further, there was evidence that defendant used his position to

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<sup>36</sup> Circuit court opinions have uniformly held that an actual nexus between the state authority and the abusive act satisfies an under color of law requirement. See, e.g., Bennet v. Pippin, 74 F.3d 578, 589 (5th Cir.) (sheriff who allegedly raped murder suspect abused power "held uniquely because of a state position"), reh'g denied, 1996 U.S. App. LEXIS 4081 (Mar. 1, 1996); Dang Vang v. Van Xiong Toyed, 944 F.2d 476, 480 (9th Cir. 1991) (where female Hmong refugees were raped by official of state employment security office during meeting about obtaining employment, "jury reasonably could have concluded that defendant used his government position to exert influence and physical control over these plaintiffs in order to sexually assault them"); Wilson v. Webb 869 F. Supp. 496, 497 (W.D. Ky. 1994) (teacher molested students "on school grounds, during school hours, and within the context of the unique teacher-student relationship"). Only where there is clearly no relation between a defendant's authority and the circumstances of the crime have courts ruled that no state action was involved. See, e.g., Becerra v. Asher, 921 F. Supp. 1538 (S.D. Tex. 1996) (mere fact child assaulted by public school teacher insufficient where assaults occurred in plaintiff's home five or six months after child withdrew from school where teacher taught); Long v. Mercer County, 795 F. Supp. 873 (C.D. Ill. 1992) (plaintiff failed to allege sexual assault related to performance of defendant's duties).

intimidate his victims into silence." 33 F.3d at 653. Respondent threatened one victim, a litigant before his court, by making it clear to her that if she told anyone about the assault, he would not allow her to retain custody of her daughter. See 33 F.3d at 647-48. He told another victim that "he was a judge, and everyone should be afraid of him." Id. at 649. He threatened a third victim by stating that "if she reported his behavior it would hurt her more than it would hurt him." Id. at 647. These were not empty threats; Judge Lanier took reprisal against victims who refused to comply with his demands. See id. at 646-50. Indeed, Respondent was quite literally "clothed with the authority of state law," Classic, 313 U.S. at 326, as he committed some of the assaults at issue wearing his judicial robes. 33 F.3d at 653. It is this particularly reprehensible portrait of a judge, an official charged with administering justice, "committing various abhorrent and unlawful sexual acts in his chambers, oftentimes while wearing his judicial robe" that "shocked the conscience" of the three-judge panel. Id.

Victims of a judge who violates their constitutional rights under color of law need the federal protections of § 242. Judge Damon Keith, in his dissent to the en banc opinion, summarized in a few sentences why prosecution under § 242 of one of the "guardians and trustees of the justice system" is so essential in this case:

If federal law is not to protect women from being forced to gratify a judicial officer at his request under threats of losing their jobs or children, whom is it to protect? Certainly, it was not intended to protect judges who commit such outrageous acts. No person is above the law, especially a judge.

73 F.3d at 1400 (Keith, J., dissenting). Applying this statute to Respondent's conduct ensures that even a sitting judge shall answer to the authority of the United States Constitution.

### CONCLUSION

The Sixth Circuit en banc majority stands alone in its unconscionable conclusion that the federal constitution provides no protection against sexual assault under color of law by a sitting judge. Accordingly, this Court should reverse the en banc opinion of the Sixth Circuit dismissing Judge Lanier's indictment under 18 U.S.C. § 242.

Respectfully submitted,

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August 1996

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<sup>37</sup> Counsel for Amici gratefully acknowledge the dedicated assistance of NOW LDEF law student intern Johanna Shargel.

**APPENDIX**

## APPENDIX

## STATEMENTS OF THE AMICI CURIAE

## NOW Legal Defense and Education Fund

NOW Legal Defense and Education Fund (NOW LDEF) is a leading national non-profit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and to secure equal rights. NOW LDEF was founded as an independent organization in 1970 by leaders of the National Organization for Women. NOW LDEF has been engaged on many fronts in efforts to eliminate gender-motivated violence, including sexual assault, and has a longstanding commitment to addressing inequality and gender bias in our state and federal judicial systems. NOW LDEF chaired the national task force that was instrumental in passing the historic Violence Against Women Act (the "Act") and is appearing and has argued as amicus curiae in the first case in which a sexual assault victim is pressing claims under the Act's civil rights remedy. NOW LDEF also has participated as counsel and as amicus curiae in numerous cases in support of the rights of women who have been the victims of sexual assault and other gender-motivated violence. NOW LDEF's project, the National Judicial Education Program, developed a model judicial education curriculum, Understanding Sexual Violence: The Judicial Response to Stranger and Nonstranger Rape and Sexual Assault, now in use across the country.

### Anti-Defamation League

Since its founding in 1913, the Anti-Defamation League ("ADL") has pursued the objective set out in its charter "to secure justice and fair treatment to all citizens alike and to put an end forever to unjust and unfair discrimination against and ridicule of any sect or body of citizens." ADL remains vitally interested in protecting the civil rights of all persons, and has previously filed numerous amicus curiae briefs before this Court in support of landmark federal civil rights laws. The League also offers the perspective of a national organization responsible for developing legislation, upheld as constitutional in Wisconsin v. Mitchell, 113 S. Ct. 2194 (1993), which responds specifically, through enhanced penalties, to bias-motivated criminal conduct.

### Ayuda, Inc.

Founded in 1971, Ayuda, Inc., is a comprehensive center providing legal and social services to the Latino community as well as to other immigrants and refugees in the Washington, D.C., metropolitan area. Ayuda's Clinical Legal Latina serves victims of sexual and domestic violence. Each year Ayuda's legal staff assists between one and two thousand women who have been victims of sexual assault perpetrated by employers, family members, acquaintances, husbands or boyfriends. Our work on behalf of battered women and women who have been victims of sexual assault, particularly those victims who are non-English-speaking or foreign-born, led to Ayuda's leadership role in assisting in the drafting of many of the provisions of the Violence Against Women Act that affected women of color and immigrant women. Ayuda provided expert counsel and technical assistance which led to the inclusion of key elements in the legislation. Ayuda also conducts

trainings on domestic violence, the Violence Against Women Act, and the immigrant experience for judges, attorneys, health care professionals, law enforcement officials, and other groups locally, across the country, and around the world.

### Center for Women Policy Studies

The Center for Women Policy Studies was founded in 1972 as the first national policy research and advocacy institute focused exclusively on issues of social and economic justice for women. The Center conducts research and advocacy programs on violence against women, work/family and "diversity" policies of employers, education, and other relevant issues.

### Connecticut Women's Education and Legal Fund, Inc.

The Connecticut Women's Education and Legal Fund, Inc. (CWEALF) is a non-profit women's rights organization incorporated in 1973. CWEALF has over 1,400 members. Its mission is to work through legal and public policy strategies and community education to end sex discrimination and to empower all women to be full and equal participants in society. CWEALF is shocked that the Sixth Circuit did not recognize the seriousness of sexual assault in this case. It seeks to join this brief as amicus curiae because it believes that freedom from sexual assault by state actors is clearly a constitutionally-protected right.

### The DC Rape Crisis Center

The DC Rape Crisis Center, established in 1972, provides direct services to survivors of sexual violence and education on related issues. The Center serves the Washington metropolitan area, utilizing a staff of eight and

a volunteer corps of 120. The DC Rape Crisis Center has a strong interest in this case because of its role as advocates for survivors of sexual violence.

### **Jewish Women International**

Jewish Women International (JWI) was founded in 1897 as B'nai B'rith Women by a group of Jewish women who sought to improve the quality of life for women in their communities. Now an organization of over 50,000 women in the United States and Canada, JWI continues to speak out on issues that affect women -- in their communities, families, and in society. JWI believes that every person is entitled to a just and fair judicial system, free of abuse and violence against women.

### **National Alliance of Sexual Assault Coalitions**

Organized in September of 1995, the National Alliance of Sexual Assault Coalitions (NASAC) is a national organization focusing on public policy and public education to end sexual violence. NASAC has developed a comprehensive grassroots communications network of state coalitions from across the United States who have extensive state public policy experience. As such, NASAC effectively advocates for the needs, rights and concerns of victims of sexual assault.

### **National Council of Jewish Women**

The National Council of Jewish Women, Inc. (NCJW) is a volunteer organization, inspired by Jewish values, that works through a program of research, education, advocacy, and community service to improve the quality of life for women, children, and families and strives to ensure individual rights and freedoms for all. Founded in 1893,

NCJW has 90,000 members in over 500 communities around the country. The National Council of Jewish Women believes that "all individuals have the fundamental right to live with their human rights and dignity guaranteed." In addition, given NCJW's National Resolutions, which support "the elimination of and protection from all forms of harassment, violence and abuse against women," we join this brief.

### **National Organization for Women Foundation, Inc.**

The National Organization for Women Foundation is a 501(c)(3) organization devoted to furthering women's rights through education and litigation. NOW Foundation is affiliated with the National Organization for Women, the largest feminist organization in the United States, with a membership of over 250,000 women and men in more than 600 chapters in all 50 states and the District of Columbia. Since its inception in 1986, NOW Foundation's goals have included prosecution of violence against women, including sexual assault, and assuring fair and equal treatment of women in the judicial system. NOW Foundation has a strong interest in the full prosecution of judicial misconduct affecting the rights of women, particularly where, as in the instant case, female litigants were assaulted and intimidated under color of law.

### **National Women's Law Center**

The National Women's Law Center (NWLC) is a non-profit legal advocacy organization that has been working since 1972 to advance and protect women's legal rights. NWLC's primary goal is to ensure that public and private sector practices and policies better reflect the needs and rights of women. NWLC has participated as amicus curiae in numerous cases in the Supreme Court involving the legal

rights of women, and has a deep and abiding interest in ensuring that the right of a woman to freedom from interference with her bodily integrity, including through sexual assault, is fully protected.

### **Northwest Women's Law Center**

The Northwest Women's Law Center (NWLC) is a non-profit public interest organization that works to advance the legal rights of all women through litigation, education, legislation and the provision of legal information and referral services. Founded in 1978, the NWLC is dedicated to challenging barriers to gender equality and ensuring that victims of all forms of discrimination and violence are able to obtain appropriate relief. Toward that end, the NWLC has a strong interest in ensuring that the fundamental purpose of federal civil rights statutes such as 18 U.S.C. § 242 are not undermined by limiting the liability of government officials whose abuse of power results in the deprivation of individuals' constitutional rights.

### **People For the American Way**

People For the American Way ("People For") is a nonpartisan citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, People For now has over 300,000 members nationwide. People For has been actively involved in efforts to combat discrimination and promote equal rights, including efforts to protect the rights of women. People For regularly supports the enactment of civil rights legislation, participates in civil rights litigation, and conducts programs and studies directed at reducing problems of bias, injustice, and discrimination. The instant

case is of particular importance in order to vindicate the fundamental principle that violation of bodily integrity by a government official acting under color of state law, particularly including intentional sexual assault as in this case, violates the Constitution.

### **Virginians Aligned Against Sexual Assault**

Formed in 1980, Virginians Aligned Against Sexual Assault (VAASA) is a statewide coalition of 21 Virginia sexual assault crisis centers, other organizations, and individuals. VAASA's statement of purpose is to work toward the elimination of sexual assault. Through providing advocacy, education and training, VAASA strives to achieve this goal. VAASA has served as an active member of various administrative and legislative study committees and commissions concerning sexual assault issues.

### **Women's Law Project**

The Women's Law Project is a Philadelphia-based non-profit legal center that seeks to advance the legal status of women through litigation, public education, and individual counseling. Since its founding in 1974, the Law Project has broken ground for women in many areas, including reproductive rights, sexual assault, child support, child custody, divorce, prison conditions, employment and insurance. Assisting women who are victims of sexual and physical assault has been a major focus of both the Law Project's telephone counseling service, which handles approximately 5,000 calls per year, and its litigation efforts. Currently, the Law Project is also leading national efforts to end insurance discrimination against victims of domestic violence.

**Women's Legal Defense Fund**

Founded in 1971, the Women's Legal Defense Fund (WLDF) is a national advocacy organization that develops and promotes public policies to help women achieve equal opportunity, quality health care, and economic security for themselves and their families.

MOTION FILED

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No. 95-1717

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In the Supreme Court of the United States

OCTOBER TERM, 1996

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UNITED STATES OF AMERICA, *PETITIONER*

v.

DAVID W. LANIER, *RESPONDENT*

---

*ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT*

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**MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*  
AND BRIEF *AMICI CURIAE* OF THE SOUTHERN  
POVERTY LAW CENTER, THE NATIONAL  
ASSOCIATION OF HUMAN RIGHTS WORKERS AND  
THE CALIFORNIA WOMEN'S LAW CENTER IN  
SUPPORT OF PETITIONER**

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*  
AND BRIEF *AMICI CURIAE*  
IN SUPPORT OF PETITIONER

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The Southern Poverty Law Center, the National Association of Human Rights Workers and the California Women's Law Center ("*amici*") hereby respectfully move for leave to file the attached brief *amici curiae* in this case. The consent of the Solicitor General, attorney for the petitioner, has been obtained. The consent of the attorney for respondent was requested but refused.

The interest of *amici* in this case arises from the fact that they are civil rights organizations that consistently promote the vigorous application of federal civil rights law.

The brief *amici* propose to file supplements the arguments raised by the Solicitor General. Specifically, the brief lends additional support to the Solicitor General's position by providing an analysis of the breadth of the constitutionally protected right to bodily integrity, the purpose of 18 U.S.C. 242 to remedy abuses of state power, and the federal

-II-

government's significant and continuing interest in redressing the increasing amount of violence perpetrated against women.

The attached brief also responds to the arguments likely to be raised by respondent. For example, in his argument before the en banc Court of Appeals as well as in response to the Solicitor General's petition for writ of certiorari filed with this Court, respondent focused on the potential for state law punishment of his abusive acts. Respondent failed to recognize that federal civil rights law punishes state officials like himself who misuse their position to deprive others of their constitutional rights. Respondent also misconstrued this Court's precedent to mean that the constitutional right to bodily integrity does not include the right to be free from sexual assault, one of the most blatant and serious invasions of bodily integrity. Because it is likely that respondent will continue to pursue this same reasoning before this Court, *amici* believe that this brief will provide the Court with a more complete argument concerning the constitutional protections under 18 U.S.C. 242.

-III-

In light of the foregoing, *amici* believe that the attached brief will assist the Court in its deliberations in this case and, therefore, respectfully urge the Court to permit the brief to be filed.

Respectfully submitted,

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## INTEREST OF AMICI CURIAE

The Southern Poverty Law Center, the National Association of Human Rights Workers and the California Women's Law Center, with the consent of the Solicitor General, appear as *amici curiae* to provide the Court with an analysis of the application of federal criminal civil rights law. *Amici* are three civil rights organizations that provide educational, legal and social services to diverse communities.

Founded in 1971, the Southern Poverty Law Center ("The Center") is an internationally recognized leader in the area of civil rights litigation. The Center has litigated numerous pioneering civil rights cases on behalf of women, minorities, factory workers, poor people in need of health care, mentally ill persons, children in foster care, prisoners facing barbaric conditions of confinement and many other victims of injustice. The Center has litigated and won five landmark civil rights lawsuits before this Court, including one of the first successful sex discrimination cases against the federal government, *Frontiero v. Richardson*, 411 U.S. 677 (1973).

The National Association of Human Rights Workers is one of the oldest civil rights organizations in the United States. The Association is composed of individuals who are engaged in human and civil rights work as professionals. Over the last several decades, this national network of human relations officials, educators, attorneys and community leaders has achieved international recognition for its pursuit of civil rights for all people.

The California Women's Law Center is a non-profit service organization established in 1989 to secure and advance the legal status of women in a wide range of areas, including employment, education, health care, child care, reproductive rights, family law and gender-based violence. The Women's

Law Center is widely known for its legal and social efforts to promote gender equality.

*Amici* have a substantial interest in demonstrating the applicability of federal legislation to criminal deprivations of civil rights by government officials who wrongfully use the power of their positions to sexually assault women.

### SUMMARY OF ARGUMENT

Section 242, Title 18, of the United States Code prohibits the willful "deprivation of *any* rights, privileges, or immunities secured by the Constitution or laws of the United States" by persons acting under color of law (emphasis added). This statute provides for the federal prosecution of government officials who wantonly breach the public trust by unjustly using their authority to deprive others of their constitutional rights.

The Sixth Circuit Court of Appeals incorrectly held that Section 242 does not, however, prohibit a judge from using his state power to sexually assault and rape female court employees and litigants. Specifically, the Sixth Circuit erroneously reasoned that Judge Lanier could not be prosecuted under Section 242 for such egregious abuses of power because this Court had not previously declared in an identical fact situation that sexual assault by a state actor under color of law violates due process and, therefore, was not a constitutional right that had been "made specific" within the meaning of *Screws v. United States*, 325 U.S. 91 (1945).

To the contrary, decisions of this Court as well as lower federal courts have long "made specific" within the meaning of *Screws* both the right to bodily integrity guaranteed by the Constitution and the fact that this constitutional guarantee

includes the right to be free from one of the most intrusive and repugnant forms of physical violation -- sexual assault. Decisions of this Court have consistently recognized the overriding importance of a constitutional right to bodily integrity. In the past century, this Court has repeatedly found the right to bodily integrity violated by, for example, the unwanted administration of medical procedures, the forcible administration of a "stomach pumping" solution to recover evidence swallowed by an arrestee and a court order requiring a female plaintiff in a civil tort action to submit to a surgical examination. *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261 (1990); *Rochin v. California*, 342 U.S. 165 (1952); *Union Pacific Ry. v. Botsford*, 141 U.S. 250 (1891). This Court's precedent thus has made clear that acts of violence committed by state officials acting under color of law analogous to those committed by Judge Lanier violate the victims' constitutional right to bodily integrity. Lower federal courts have also consistently upheld convictions of officials like Judge Lanier who perpetrate sexual assaults while acting under color of law. See *United States v. Davila*, 704 F.2d 749 (5th Cir. 1983); *United States v. Contreras*, 950 F.2d 232 (5th Cir. 1991), *cert. denied*, 504 U.S. 941 (1992). Accordingly, respondent was on notice at the time he sexually assaulted and orally raped women having business with his court that his actions were punishable under 18 U.S.C. 242. If the Sixth Circuit's order dismissing the charges against respondent were allowed to stand, the federal government's power to prohibit state officials from violating the constitutional rights of the women they are supposed to serve would be severely and unjustifiably limited.

## STATEMENT

Respondent, former Tennessee Chancery Court Judge David W. Lanier, a member of a local politically prominent family whose brother was the state prosecutor for the area, was convicted of seven criminal counts under 18 U.S.C. 242 for sexually assaulting five women in his chambers during ordinary business hours -- once while wearing his judicial robe. Each of the victims was in respondent's chambers as a court system employee, as an applicant for such a post or as a litigant over whom respondent had continuing jurisdiction. Respondent was the only Chancellor and juvenile court judge in Dyer and Lake Counties; all employees of the two courts held their positions at his discretion.

One sexual violation committed by respondent was on a woman who was both a prospective court employee and former litigant before respondent's court in a child custody matter. Respondent first perpetrated forcible oral rape on her when she visited his chambers seeking employment. Before violating her, respondent told her that the custody matter could be reopened and reminded her that he would be the presiding judge on its rehearing. Respondent then lured her back to his chambers a second time by claiming that he had another job prospect for her. Mindful of his power over her child custody matter, the victim reluctantly revisited respondent's chambers, where respondent committed forcible oral rape on her again.

Judge Lanier was convicted under 18 U.S.C. 242, sentenced to 25 years in federal prison and fined \$25,000. The Sixth Circuit Court of Appeals, in a unanimous opinion, affirmed the trial court's conviction and sentence, holding that the judge's sexual attacks constituted willful deprivations under

color of law of the victims' constitutional "right to bodily integrity." On rehearing, a sharply divided en banc court reversed the original panel's decision and ordered all counts dismissed.

The Solicitor General then filed a petition for a writ of certiorari with this Court, further supported by an additional brief submitted by *amici*, seeking review of the following issues: (1) whether "a defendant may [only] be convicted under 18 U.S.C. 242 for the willful violation of a right secured by the Due Process Clause of the Fourteenth Amendment [if] that right has previously been made specific by a decision of this Court in factually similar circumstances;" and (2) "[w]hether, for purposes of 18 U.S.C. 242, the right secured by the Due Process Clause of the Fourteenth Amendment to be free from interference with bodily integrity by a sexual assault by a state official acting under color of law has been 'made specific,' within the meaning of *Screws v. United States*, 325 U.S. 91 (1945)." On June 17, 1996, this Court granted certiorari.

## ARGUMENT

### I. The Sixth Circuit's Opinion Improperly Denies Constitutional Protection For Unjustified And Invasive Assaults On Bodily Integrity By State Officials Acting Under Color Of Law

For over a century this Court has consistently recognized the overriding importance of a constitutional right to bodily integrity: "[N]o right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all

restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pacific Ry. v. Botsford*, 141 U.S. 250, 251 (1891). A long line of decisions by this Court has made clear that the "constitutional interest in liberty . . . [includes] a right to bodily integrity, a right to control one's own person" and the right of a woman "to retain . . . ultimate control over her . . . body." *Planned Parenthood v. Casey*, 505 U.S. 833, 869, 915 (1992); *see also Rochin v. California*, 342 U.S. 165, 173, 174 (1952) (noting the "general requirement" that "states in their prosecutions respect certain decencies of civilized conduct" and avoid "force [that is] so brutal and so offensive to human dignity"); *Ingraham v. Wright*, 430 U.S. 651, 673 (1977) (stating that one of "the historic liberties" the Due Process Clause protects is "a right to be free from . . . unjustified intrusions on personal security"); *Youngberg v. Romeo*, 457 U.S. 307, 315-16, 324 (1982) (stating that "a right to freedom from bodily restraint" is not only "clear in the prior decisions of this Court," but has "always . . . been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action") (citation and quotations omitted); *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 278 (1990) (O'Connor, J., concurring) ("state incursions into the body [are] repugnant to the interests protected by the Due Process Clause").

Specifically, this Court has found the right to bodily integrity to be violated by the unwanted administration of medical procedures (*Cruzan*, 497 U.S. 261), the forcible administration of a "stomach pumping" solution to recover evidence swallowed by an arrestee (*Rochin*, 342 U.S. 165), the unreasonable use of bodily restraints on an institutionalized

patient in a state mental hospital (*Youngberg*, 457 U.S. 307), the unreasonable administration of corporal punishment on public school students (*Ingraham*, 430 U.S. 651), the placement of certain restrictions on abortion (*Casey*, 505 U.S. 833) and a court order requiring a female plaintiff in a civil tort action to submit to a surgical examination (*Botsford*, 141 U.S. 250).

Drawing on this precedent, lower federal courts have likewise affirmed convictions under Section 242 for the commission of sexual assaults by government officials acting under color of law. Indeed, until this case, federal courts have consistently upheld convictions obtained under 18 U.S.C. 242 for sexual assaults perpetrated under color of law. *See United States v. Davila*, 704 F.2d 749 (5th Cir. 1983) (unanimously affirming convictions of Border Patrol Officers who used their office to coerce sex from and sexually abuse undocumented women); *United States v. Contreras*, 950 F.2d 232, 236 (5th Cir. 1991) (affirming conviction under Section 242 of police officer who sexually assaulted an undocumented woman whom he had detained following a traffic stop), *cert. denied*, 504 U.S. 941 (1992).<sup>1</sup>

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<sup>1</sup> In applying 42 U.S.C. 1983, "the civil counterpart" to Section 242, (*United States v. Price*, 383 U.S. 787, 795 n.7 (1966)), federal courts have also consistently held that sexual assaults committed by state actors under color of law violated the victims' constitutional right to bodily integrity. *See, e.g., Doe v. Taylor Independent Sch. Dist.*, 15 F.3d 443, 451 (5th Cir.) (en banc), *cert. denied*, \_\_\_ U.S. \_\_\_, 115 S. Ct. 70 (1994); *Dang Vang v. Vang Xiang X. Toyed*, 944 F.2d 476, 479 (9th Cir. 1991); *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 726-27 (3d Cir. 1989) (en banc), *cert. denied*, 493 U.S. 1044 (1990); *Hall v. Tawney*, 621 F.2d 607, 613 (4th Cir. 1980). Although decided under a different statute, these cases are nonetheless persuasive here because "[t]he protections of the Constitution do

Department of Justice statistics further evidence the federal courts' longstanding recognition that sexual assault committed under color of law is a civil rights deprivation punishable under Section 242. Since 1989, at least 17 judges, police officers, correctional officers and border patrol agents have been prosecuted and sentenced under Section 242 for improperly using their positions to rape and sexually assault women in their community. See Appendix at A-1 through A-6. Two other judges beside respondent have been sentenced for committing sexual assaults under color of law in violation of Section 242. *Id.* at A-1. They both pled guilty to the charges levelled against them, even though the assault perpetrated by one of them was less physically intrusive than the forcible rape committed by respondent. See Twila Decker, *Ex-Magistrate Admits Fondling*, THE STATE (Columbia, S.C.), Nov. 7, 1995, at B1 (former magistrate who, while he was still a judge, fondled the breast of a woman who had come to him for legal help, pled guilty to a one-count information charging a violation of 18 U.S.C. 242). The legislative branch has likewise recognized sexual assaults committed by public officials under color of law to be proscribed by 18 U.S.C. 242: in the Violent Crime Control and Law Enforcement Act of 1994 Congress enhanced the punishment for crimes of sexual violence prosecuted under Section 242. See Pub. L. No. 103-322, § 320103(b)(3), 108 Stat. 2109.

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not change according to the procedural context in which they are enforced -- whether the allegation that constitutional rights have been transgressed is raised in a civil action or in a criminal prosecution, they are the same constitutional rights." *United States v. Reese*, 2 F.3d 870, 884 (9th Cir. 1993), cert. denied, \_\_\_ U.S. \_\_\_, 114 S. Ct. 928 (1994).

Accordingly, at the time respondent sexually assaulted women in his judicial chambers, the constitutional right to bodily integrity had been "made specific" within the meaning of *Screws v. United States*, 325 U.S. 91 (1945). It is not necessary for this Court to specifically determine, based on an identical factual situation, that a sexual assault by a state actor under color of law violates due process before respondent's blatant violations of women's civil rights may be punished. This Court has determined that less invasive actions perpetrated by state officials under color of law -- such as the unreasonable use of bodily restraints and corporal punishment -- violate an individual's constitutional right to bodily integrity. It is axiomatic, then, that sexual assault by state officials acting under color of law also violates the victims' constitutional right to bodily integrity. Sexual assault is one of the most brutal and invasive methods of violating a person's bodily integrity -- a method of violation which, it is well-documented, causes victims to suffer not only immediate, intense trauma but also profound and lasting psychic injury. See Steven Bennett Weisburd & Brian Levin, "On The Basis of Sex": Recognizing Gender-Based Bias Crimes, 5 STAN. L. & POL'Y REV. 21, 30-31 (1994); Brief Amici Curiae of NOW Legal Defense & Education Fund, et al., in Support of Petitioner at 17-23. Indeed, the lower courts have readily concluded, based on this Court's precedent, that such sexual assaults deprive a person of his or her constitutional right to bodily integrity. Thus, it was obvious under the prevailing case law that sexual assault committed under color of law offended a "principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental" and violated the Constitution. *Screws*, 325 U.S. at 95. Anyone in respondent's position should have

known, at the time he committed these assaults, that his actions violated federal law.

Under the Sixth Circuit's rule, no conviction could be final until this Court determined that the individual factual situation presented amounted to a constitutional violation. This would have the unconscionable effect of allowing obvious constitutional violations arising from slightly different factual situations to go unpunished until this Court has had the opportunity to specifically determine that the particular physical intrusion involved violates the Constitution. The state of the law would thus remain perpetually frozen in time, since this Court would be unlikely to encounter the identical set of facts twice.

The Sixth Circuit's en banc holding would have the further anomalous effect of affording greater constitutional protections to prisoners and criminal suspects than to law-abiding citizens. It would mean that a female arrestee would enjoy Fourth Amendment protection from an automatic strip search, but law-abiding women would not be protected from sexual assault by state actors under the Due Process Clause. *See Weber v. Dell*, 804 F.2d 796, 802 (2d Cir. 1986) (holding that, in the absence of a reasonable suspicion that a weapon or contraband is being concealed, the Fourth Amendment precludes strip searches of arrestees on minor charges), *cert. denied*, 483 U.S. 1020 (1987); *accord Chapman v. Nichols*, 989 F.2d 393, 395, 399 (10th Cir. 1993). If the Sixth Circuit's decision is allowed to stand, law-abiding individuals will be entitled to fewer rights than arrestees or convicted felons in federal prisons.

Finally, it would be an anomaly to allow conduct as shocking as respondent's to escape punishment. The primary

purpose of 18 U.S.C. 242 is to redress unconstitutional abuses of state power by public officials. Indeed, as this Court noted in *Screws*, 325 U.S. at 116, "it was abuse of basic civil and political rights, by states and their officials, that the amendment and the enforcing legislation [18 U.S.C. 242] were adopted to uproot." *See also Daniels v. Williams*, 474 U.S. 327, 331 (1986) ("The touchstone of due process is protection of the individual against arbitrary action of government . . . . [It] serves to prevent governmental power from being used for purposes of oppression.") (citations and quotations omitted). Unconstitutional abuses of state power may manifest themselves in a myriad of ways. *See, e.g., United States v. Stokes*, 506 F.2d 771, 775 (5th Cir. 1995) (holding that police officer violated arrestee's due process "right to be free from unlawful assault by state law enforcement officers" by severely beating him while he was in custody at the police station); *Shillingford v. Holmes*, 634 F.2d 263, 265 (5th Cir. 1981) (holding that a police officer violated the due process right of a tourist "to be free of state-occasioned damage to [his] bodily integrity" by striking him with a nightstick when he attempted to photograph the officer making an arrest). Recognizing this, Congress broadly worded both Section 242 and its companion conspiracy statute (18 U.S.C. 241) to ensure that the full range of governmental abuses giving rise to constitutional violations would be punished. *Cf. United States v. Price*, 383 U.S. 787, 801 (1966) ("[T]he events from which [Section 241] emerged illuminate the purpose and means of the statute in an unmistakable light. We [therefore] *must accord it a sweep as broad as its language.*") (emphasis added); *accord United States v. Johnson*, 390 U.S. 563, 566 (1968).

Respondent used his leverage as a judge to extort, intimidate and sexually assault his victims. He threatened them with loss of their jobs and, in the case of one victim, custody of her child, if they did not submit to his demands. Moreover, these blatant and shocking displays of abuse of state power -- two forcible oral rapes and numerous sexual assaults -- were all committed in respondent's judicial chambers, the seat of his judicial power.<sup>2</sup> Respondent was more than incidentally a state actor when he engaged in his criminal conduct. Respondent assaulted, in his judicial chambers, past and potential litigants before his court. He even committed one assault while wearing his judicial robe. This is exactly the type of gross abuse of state power that Section 242 was designed to protect against.

**II. The Federal Government Has A Significant Interest In Prosecuting Violent, Unconstitutional Assaults Against Women, Particularly Where, As Here, State Remedies May Be Inadequate**

The federal government has a significant and longstanding interest in redressing violations of the Constitution. Indeed, acts like the ones perpetrated by respondent,

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<sup>2</sup> Rape itself "undermines the community's sense of security," as well as the individual victim's, thereby causing "public injury." *Coker v. Georgia*, 433 U.S. 584, 598 (1977). Respondent's added use of the power of his public office to sexually violate members of the community makes his crimes even more reprehensible, since such a flagrant misuse of state office serves to shake the public trust in the country's democratic and legal institutions.

which squarely and indisputably involve state action in direct violation of the mandate of the Fourteenth Amendment . . . [are] a direct, traditional concern of the Federal Government. It is an area in which the federal interest has existed for at least a century, and in which federal participation has intensified as part of a renewed emphasis on civil rights.

*Price*, 383 U.S. at 806. Congress has shown a similar commitment to protecting the civil rights of women, as demonstrated most recently by its enactment of the Violence Against Women Act of 1994 (VAWA).<sup>3</sup>

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<sup>3</sup> The United States has also confirmed that it considers sexual assaults against women to constitute human rights violations where state actors participate in the assaults in some way. In 1995, the Immigration and Naturalization Service formally recognized rape, domestic abuse and other forms of violence against women perpetrated by or acquiesced in by government actors to be potential grounds for political asylum. See Ashley Dunn, *U.S. to Accept Asylum Pleas for Sex Abuse*, N.Y. TIMES, May 27, 1995, at 1. These INS guidelines specifically provide that the evaluation of gender-based asylum claims must "be viewed within the framework provided by existing international human rights instruments and the interpretation of these instruments by international organizations." *Fisher v. INS*, 79 F.3d 955, 967 (9th Cir. 1996) (en banc) (Norris, J., dissenting) (quoting INS guidelines). The guidelines refer to a human rights convention that took place a decade before respondent assaulted his victims, the 1979 Convention on the Elimination of All Forms of Discrimination Against Women. The guidelines also mention the 1993 Declaration on the Elimination of Violence Against Women, adopted by the General Assembly of the United Nations, which officially recognizes violence against women "as both a per se violation of human rights and as an impediment to the enjoyment by women

Like other civil rights statutes before it (including Section 242), VAWA was enacted to stem a rising tide of violence against a distinct class of individuals,<sup>4</sup> ensure equal protection of the laws and rectify biases in existing state laws.

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of other human rights." *Id.* (quotations and citation omitted).

It would indeed be "passing strange" (*United States v. Lanier*, 73 F.3d 1380, 1399 (6th Cir. 1996) (Nelson, J., dissenting)) if the United States were to condemn as human rights violations sexual assaults perpetrated against women by other countries' officials but yet, like the Sixth Circuit, fail to recognize that the same type of violence committed against women in this country similarly gives rise to a civil rights violation.

<sup>4</sup> Recent studies confirm that violence against women remains pervasive. According to the most recent statistics from the U.S. Department of Justice's Bureau of Statistics, in 1993 and 1994, women over the age of twelve annually sustained approximately 5 million violent victimizations (most often, sexual assaults and forcible rapes), 60 percent of which were perpetrated, as in the instant case, by offenders whom the victim knew. See *Prepared Statement of Janet Reno, Attorney General, Before the Senate Committee on the Judiciary Concerning the Violence Against Women Act*, 1996 WL 5512565 \*4 (May 15, 1996). The newly published report, UNDERSTANDING VIOLENCE AGAINST WOMEN ("VIOLENCE REPORT"), by THE NATIONAL RESEARCH COUNCIL PANEL ON RESEARCH ON VIOLENCE AGAINST WOMEN, similarly reflects that the average annual rate of violent victimization for young women aged 12-18 is approximately 75 per 1000. VIOLENCE REPORT at 32. According to the report, women of all ages, races and geographic locations are most likely to suffer violence at the hands of a male assailant who is known to them (either an acquaintance, friend or intimate). *Id.* at 29-32. Study findings variously estimate that between 20 and 50 percent of all women will be victims of sexual assault in their lifetime (*id.* at 32); significantly fewer will suffer sexual violence at the hands of a state actor like the victims here, however.

See S. REP. NO. 138, 103d Cong. 1st Sess. 57-58, 68 (1993). Among other protections, VAWA provides an additional remedy -- over and above those already provided for in existing civil rights law -- to victims of gender-based violence. See 42 U.S.C. 13981; S. REP. NO. 138, 103d Cong. 1st Sess. 67 (1993) ("This legislation is in no way intended to undermine existing civil rights protections. . . . It should be read in harmony with, not in derogation of, those provisions.").<sup>5</sup>

The federal government's interests in enforcing rights guaranteed under the Constitution and redressing violence against women are heightened in cases such as this where potentially overlapping state remedies may be unavailable. Indeed, "one reason [Section 242] was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of [Fourteenth Amendment] rights, privileges and immunities . . . might be denied by the state agencies." *Monroe v. Pape*, 365

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<sup>5</sup>As the legislative history reflects, this remedy is "truly a [classic] civil rights remedy. It redresses conduct that is motivated by bias or hatred toward a class of individuals because of a defining characteristic -- gender." *Crimes Of Violence Motivated By Gender: Hearings On H.R. 113, The Violence Against Women Act of 1993, Before The Subcomm. on Civil and Constitutional Rights of The House Comm. on The Judiciary*, 103d Cong., 1st Sess. 101-02 (1993) (statement of James P. Turner, Acting Assistant Attorney General, Civil Rights Division, U.S. Department of Justice). Cf. Weisburd & Levin, *Recognizing Gender-Based Bias Crimes*, 5 STAN. L. & POL'Y REV. 21 (1994) (arguing that the recognition of gender as a distinct category of bias crime -- and another form of criminal civil rights violation -- would further assist in remediating violent, status-based deprivations of women's civil rights).

U.S. 167, 179 (1961); *see also* S. REP. NO. 138, 103d Cong. 1st Sess. 68 (1993) (noting in the legislative history of VAWA that "[u]nder the 14th Amendment, there is no clearer case of Congress's power to legislate than when States have failed to protect equal rights."). Section 242 has often been used to bring abusive state officials like Judge Lanier to justice where, as here, a state court prosecution would be difficult. *See, e.g.,* Lucy Morgan, *Bill Targets Law Officers Who Use Authority to Demand Sex*, ST. PETERSBURG TIMES (Fla.) April 19, 1995, at 1B (noting that, according to the Florida State Attorney, a correctional officer convicted under Section 242 for forcing at least a dozen female inmates to repeatedly perform oral sex on him was not prosecuted under state law because "a prosecution under state law would have been more difficult"); HUMAN RIGHTS WATCH WOMEN'S RIGHTS PROJECT, THE HUMAN RIGHTS WATCH GLOBAL REPORT ON WOMEN'S HUMAN RIGHTS, 164, 165, 176 (1995) (documenting cases nationwide of male corrections officers and nonsecurity prison staff sexually assaulting and raping female prisoners; noting that "although U.S. law offers female prisoners some protections from sexual misconduct by officers, these protections are inconsistent across states and their enforcement . . . has been woefully inadequate;" and concluding that "states prosecute very few cases of sexual intercourse or sexual touching between officers and prisoners. The majority of . . . States . . . have no criminal law that deals directly with this abuse and those that do often decline fully to enforce such prohibitions."). Here, the stranglehold respondent and his family had on local state politics protected him from being prosecuted by the state for his crimes. (His family was not only politically prominent in the county, but his brother was the local prosecutor.) Prosecution

by the federal government therefore remained the only way to bring respondent to justice.<sup>6</sup>

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<sup>6</sup> Even if his family's political power had not precluded respondent from being prosecuted under state law, the fact remains that this is the type of case federal civil rights law was intended to address. *See Monroe*, 365 U.S. at 183. ("The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.")

## CONCLUSION

For the foregoing reasons, *amici* urge that the decision of the Sixth Circuit Court of Appeals be reversed.

Respectfully submitted,

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## APPENDIX

### ADDITIONAL CRIMINAL CIVIL RIGHTS PROSECUTIONS BROUGHT AGAINST GOVERNMENT OFFICIALS FOR SEXUAL ASSAULTS UNDER COLOR OF LAW 1989-1996

#### Assaults by Judges

*U.S. v. Lee* (11/6/95) (D. S.C.)

The former state magistrate in Horry County pled guilty to sexually assaulting a vulnerable woman who had come to him for legal advice.

*U.S. v. Morris* (1/19/95) (N.D. Miss.)

An Alcorn County justice pled guilty to sexually assaulting a woman during the course of a discussion with her regarding legal matters. He was sentenced to six months home detention, three years probation and fined \$3,000.

#### Assaults by Police Officers

*U.S. v. Contreras* (5/31/90) (S.D. Tex.)

A Laredo Police Department officer was sentenced to 61 years in prison and fined \$250,000 for his conviction of raping a Mexican woman while he was on duty and

conspiring to murder her when she was to testify against him in connection with his state trial.

*U.S. v. Gregg* (5/30/90) (D. V.I.)

A Virgin Islands Department of Public Safety officer pled guilty to sexually assaulting an individual whom he had stopped for a traffic violation. He was sentenced to three months in prison and two years probation.

*U.S. v. Jackson & George* (7/14/92) (D. V.I.)

Two Virgin Islands Department of Public Safety officers were convicted of sexually assaulting a woman and stealing money from a man whom they had driven to a remote area. Jackson was sentenced to 70 months in prison; George was sentenced to six months imprisonment, fined \$5,000 and ordered to pay \$608 in restitution.

*U.S. v. Pich* (8/3/93) (N.D. Ill.)

A North Riverside police officer was sentenced to a year probation and agreed to resign from law enforcement after pleading guilty to providing a false statement to the FBI regarding his having consensual sex with a woman being detained by INS at the local jail.

*U.S. v. Sanchez* (3/29/94) (S.D. Tex.)

A Galveston police officer was sentenced to 15 years in prison and fined \$1,000 along with \$175 in special

assessments after being convicted of coercing five women into engaging in sexual acts with him and physically assaulting one of them. In January 1996, the Fifth Circuit Court of Appeals reversed his conviction and remanded for a new trial, ruling that the district court had abused its discretion in impaneling an anonymous jury. In April 1996, defendant Sanchez pled guilty to five misdemeanor charges for coercing women to engage in sexual acts with him while on duty as a Galveston police officer.

#### Assaults by Border Patrol and Correctional Officers

*U.S. v. Clendenen* (5/18/92) (W.D. Va.)

A Washington County correctional officer was sentenced to 37 months in prison and ordered to pay \$14,933 in restitution after pleading guilty to charges arising from his coercing inmates into sexual encounters in exchange for drugs and privileges.

*U.S. v. Foote* (8/28/90) (D. Ariz.)

The defendant, a detention officer of the Bureau of Indian Affairs, was charged in a 13-count indictment in the sexual assault of Indian women during their incarceration in a BIA jail in Peach Springs, Arizona. He was sentenced to two years in prison followed by two years of supervised release.

A-4

*U.S. v. Harrison* (11/16/94) (N.D. Fla.)

A Gulf County Sheriff was convicted of using his position as sheriff to coerce five female inmates at the Gulf County Jail to engage in sexual acts with him. He was sentenced to 51 months imprisonment to be followed by one year of supervised release.

*U.S. v. Huff* (1/9/92) (S.D. W.Va.)

A Wayne County probation officer pled guilty to having sex with a female probationer whom he threatened to send to jail if she did not comply. He was sentenced to 20 months imprisonment.

*U.S. v. Perales* (8/24/89) (S.D. Tex.)

An INS detention officer was sentenced to ten months in prison for his guilty plea to a sexual assault of Mexican juveniles who were being detained.

*U.S. v. Ramirez* (10/11/89) (S.D. Tex.)

A Plant Protection and Quarantine Officer with the Animal and Plant Health Inspection Service of the Department of Agriculture was sentenced to two years probation and fined \$250 for his guilty plea to sexually assaulting female Mexican nationals crossing the border from Mexico into the United States.

A-5

*U.S. v. Selders* (4/5/95) (D. Ariz.)

A Border Patrol agent in Nogales pled guilty to sexually assaulting a female victim after detaining her for illegally entering the country. He was sentenced to 12 months in prison and three years probation.

*U.S. v. Smith* (4/20/95) (E.D. Ky.)

A correctional officer at the Federal Medical Center in Lexington was sentenced to 262 months in prison to be followed by three years supervised release after being convicted of sexually assaulting three female inmates and having sexual relations with a fourth female inmate.

*U.S. v. Toothman* (11/4/94) (S.D. Cal.)

An inspector with the Immigration and Naturalization Service was indicted for sexually assaulting a foreign national who was appealing the confiscation of her border crossing card. After the assault, the defendant returned the victim's border crossing card to her and offered to obtain border crossing cards for her children if she agreed to see him again.

*U.S. v. Walsh* (1/4/96) (W.D. N.Y.)

A correctional officer with the Orleans County Jail was indicted for stomping on the penis of an inmate. Another correctional officer witnessed the incident.

A-6

*U.S. v. Wescogame* (12/6/93) (D. Ariz.)

An officer with the Bureau of Indian Affairs pled guilty to raping a young Indian woman when she was being detained at a BIA detention facility. He was sentenced to 30 months in prison.

Source: *U.S. DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION, CRIMINAL SECTION.*

MOTION FILED  
AUG 16 1996

No. 95-1717

10

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1995

UNITED STATES of AMERICA,

*Petitioner,*

v.

DAVID W. LANIER,

*Respondent.*

On Writ of Certiorari to the  
United States Court of Appeals  
for the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS  
CURIAE, AND BRIEF OF VIVIAN FORSYTHE-  
ARCHIE AND THE NATIONAL COALITION  
AGAINST SEXUAL ASSAULT AS AMICUS  
CURIAE IN SUPPORT OF PETITIONER

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*Counsel for Amicus Curiae*

45 PW  
BEST AVAILABLE COPY

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM 1995

---

United States of America, Petitioner

v.

David W. Lanier, Respondent

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Vivian Forsythe-Archie and The National Coalition Against Sexual Assault hereby ask leave to file the attached *Brief of Vivian Forsythe-Archie and The National Coalition Against Sexual Assault As Amicus Curiae in Support of Petitioner*, pursuant to Supreme Court Rule 37, on the following grounds:

1. Judge David W. Lanier was convicted by the jury in this action of two felony rapes of Vivian Forsythe-Archie. As a victim and survivor of sexual assault by Judge Lanier, and as a woman citizen of the United States, Vivian Forsythe-Archie has a direct interest in protecting her federal rights, and those of other women, including others sexually victimized by Judge Lanier, to be free from sexual assault committed under color of law.

2. The National Coalition Against Sexual Assault (NC-ASA) is a voluntary national organization of over 450 rape crisis centers and individuals, including in the State of Tennessee that, from its founding in 1978, has engaged in organizing, education, research, legislation, litigation, and support of direct service providers who work with survivors of sexual assault. NCASA

exists to end sexual assault. This purpose gives the organization an interest in the proper enforcement and interpretation of laws against sexual assault.

3. The brief of proposed *amici* brings to the attention of the Court relevant matter not already presented by the parties. The decision by the Court of Appeals for the Sixth Circuit (en banc) in this action dismissed the indictment and reversed the convictions of Judge Lanier for lack of a specific and defined basis in federal law as required under 18 U.S.C. §242. *Amici* present a legal argument considered by neither party: that a vast body of federal *sex equality* law specifically defines Judge Lanier's acts of sexual aggression as illegal, making his prosecution under 18 U.S.C. §242 clearly permissible as a matter of law.

4. Based on the foregoing, *amici* have an interest in supporting the position of the petitioner United States reinstating defendant's convictions and in urging reversal of the Sixth Circuit opinion dismissing his indictments.

5. Counsel for *amici* is a Member of the Bar of the Supreme Court of the United States.

6. *Amici* and their counsel offer this Court considerable and distinctive expertise in this important case, based on their extensive experience and knowledge of the legal and social issues raised by sexual assault and victimization.

7. Consent to file this brief has been granted by petitioner and refused by respondent. A copy of the letter of petitioner granting consent is filed with this motion.

8. This brief is filed on August 16, 1996, within the time period required for filing of the brief for petitioner. In addition to the copies filed as required under Supreme Court Rule 26, a copy of the proposed brief was sent to attorney for

the respondent by Federal Express to arrive at his office on August 19, 1996, as specified in the Certificate of Service.

Wherefore, Vivian Forsythe-Archie and NCASA request that this Motion for Leave to File Brief Amicus Curiae be granted and that the attached brief accordingly be filed in this action.

Respectfully submitted,

Catharine A. MacKinnon  
625 S. State St.  
Ann Arbor, MI 48109-1215  
(313) 647-3595  
Attorney for Amici Curiae

August 16, 1996



U. S. Department of Justice  
Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

August 14, 1996

Professor Catharine A. MacKinnon  
The University of Michigan  
Ann Arbor, Michigan 48109-1215

Re: United States v. David W. Lanier  
S. Ct. No. 95-1717

Dear Professor MacKinnon:

As requested in your letter of August 14, 1996, I hereby consent to the filing of an amicus curiae brief on behalf of Vivian Forsythe-Archie and The National Coalition Against Sexual Assault.

Sincerely,

*Walter Dellinger*  
Walter Dellinger  
Acting Solicitor General

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## CONSENT OF THE PARTIES

Letter of Petitioner United States, consenting to the filing of this brief, is filed separately. Respondent declines to consent to the filing of this brief.

## STATEMENT OF INTEREST

Vivian Forsythe-Archie was a complaining witness in the federal criminal prosecution under 18 U.S.C. §242 against Judge David W. Lanier, defendant in this action. The jury found him guilty of raping her twice in the mouth and throat in his judicial chambers. Lanier had lured her there by inducements of employment made in connection with his dangled threat to take custody of her child away, securing her silence about the attacks by the same means.

Amicus Archie, as a woman citizen of the United States, has an interest in protecting her federal rights, and those of other women, to be free from sexual assault by state actors.

As a woman U.S. citizen victimized by Judge Lanier, amicus Archie opposes the Sixth Circuit *en banc* majority ruling in this case that there is no clear federal right not to be sexually assaulted by a sitting judge and public employer who was acting in both capacities at the time. At trial, she testified she "was very angry for him invading me and taking away my rights...because he forced me to do things that I didn't want to do. And I have my rights as a human being and as a citizen of these United States that were taken away from me...I am an intelligent woman and I have rights as a United States citizen. There is a Bill of Rights, and I have those (crying)...That is how I felt when I left that room, my rights had been taken away from me." Transcript of Trial Before the Honorable Jerome Turner, Memphis Tennessee, No. CR92-2-0172-TU (W.D. Tenn W.D. 1992) ("Tr.") Vol. III at 457-458. Amicus Archie believes that Judge Lanier, as a judge, well knew that she had the same rights that she knew she had.

In particular, amicus Archie has an interest in and right

to equal treatment by her own government. She is here to protect and defend her federal sex equality rights and those of other women, including others victimized by Judge Lanier, as well as their liberty.

The National Coalition Against Sexual Assault (NCASA) is a voluntary organization with a diverse membership of over 450 rape crisis centers and individuals from all over the United States, including Tennessee. From its inception in 1978, NCASA has been recognized as a major forum and force for eliminating sexual aggression and violence. NCASA exists to end sexual assault through organizing, education, and legislation and to educate and support direct service providers who work with survivors to that end. It pursues its goals through assisting victims, raising public awareness, strengthening laws and law enforcement, and supporting research. Among its other activities, NCASA provides current, accurate, and comprehensive information on sexual assault -- including on the responses of survivors and the community to the sexual assault experience and reports of that experience -- to victim service providers, public policy makers, media, members, and the public. Through its Public Policy Committee, NCASA educates policymakers, networks with other organizations, and issues policy statements. Through NCASA State Contacts and Regional Representatives, NCASA also monitors the enactment and enforcement of national and state laws, including laws against sexual harassment, that have an impact on sexual violence.

Through its members and activities, NCASA has come to understand that sexual assault, the most common victims of which are women and the most common perpetrators of which are men, deprives those violated of their bodily integrity and human dignity, is an act of inequality, flourishes in societies of gender hierarchy, and is appropriately addressed among other means through laws against sex-based discrimination. NCASA has also repeatedly observed that the testimony of survivors of sexual assault, particularly women,

because of invidious attitudes endemic to unequal societies, is often not believed. The interest of NCASA in eliminating sexual assault gives it an interest in promoting laws against it based on this information and these understandings.

## BACKGROUND STATEMENT

Eight women charged Judge David W. Lanier, Chancellor of Dyer and Lake Counties in the State of Tennessee, of eleven federal criminal counts of violating their civil rights by sexually assaulting them in his judicial chambers. All eight women worked for or with him at the courthouse or had litigation before him. All had come to see him on business. All testified under subpoena. All eight testified they feared his official power. See, e.g., Tr. Vol. II at 134,141 (Sandy Sanders); Tr. Vol. II at 237 (Sandy Attaway); Tr. Vol. III at 381-384 (Vivian Archie); Tr. Vol. III at 475 (Patty Mahoney); Tr. Vol. IV at 605 (Ruby Sipes); Tr. Vol. IV at 708 (Lisa Couch); Tr. Vol. V at 830-831 (Fonda Bandy); Tr. Vol. V at 902,904 (Patty Wallace). Many still worked under him at the time of trial.

The jury found Lanier guilty of seven counts of sexual assault against five women. He was acquitted on three counts. The district court granted defendant's motion for judgment of acquittal on one count (Count 9) before sending it to the jury.

The jury convicted Judge Lanier of two counts of oral rape of amicus Vivian Archie in his judicial chambers. She testified that Lanier gained access to her and guaranteed her silence by a threat to take legal custody of her daughter away. Tr. Vol. III at 376-380, 388-392, 396.

The jury convicted Judge Lanier of repeatedly groping the breasts and buttocks of his secretary Patty Mahoney. She testified she was forced to quit her job as a consequence. Tr. Vol. III at 479-485.

The jury convicted Judge Lanier of forcibly kissing the

mouth and assaulting the breasts of Sandy Sanders, a juvenile officer hired by Lanier who was required to meet with him weekly. See Tr. Vol. II at 123-125, 126-128. She testified that, after she confronted him about his behavior, he retaliated by criticizing her work and removed her supervisory authority. Tr. Vol. II at 147-148. She remained on the job out of commitment to helping children. (The jury acquitted him of assaulting her buttocks.)

The jury convicted Judge Lanier of grabbing Sandy Attaway, his secretary, of hitting her on the buttocks, and of holding her body to him while he ground his erect penis into her buttocks while gowned in his judicial robes. She testified she told him loudly to stop. Tr. Vol. II at 225-226. She did not quit work because she needed the job. Three months later he fired her, saying things were not working out. He later told her they would have gotten along fine if she had liked oral sex. Tr. Vol. II at 258.

The jury convicted Judge Lanier of forcibly kissing the lips and grabbing the breasts and crotch of Fonda Bandy. She testified that she met with him in chambers in connection with a federal program of parenting classes she had initiated. As she was leaving, he told her if she came back, he would send her all the clients she needed. Tr. Vol. V at 844-845. She never went back and he made no referrals to her program.

The jury acquitted Judge Lanier of forcing sexual intercourse on Lisa Couch, a litigant in a child custody matter in his court. Tr. Vol. IV at 710, 730-731, and of molesting the vaginal area of Patty Wallace, a clerk of court, with his hand behind his judicial bench for one and a half hours while court was in session. See Tr. Vol. V at 887-889. Lisa Couch testified that he was able to assault her because of his power of "being a judge," Tr. Vol. IV at 745, particularly in reference to a pending child custody matter. Tr. Vol. IV at 744-746; 749 ("But I just felt that he had power over me, control over

me."). Patty Wallace testified that she did not think her account would be believed "because he is a judge, and we were in court and there were attorneys there." Tr. Vol. V at 902.

The trial judge dismissed for legal insufficiency the charge based on the testimony of Ruby Sipes that Judge Lanier exposed his erect penis to her and masturbated himself in front of her when she came to his chambers to discuss a case she had pending before him, on which he subsequently ruled against her. Tr. Vol. IV at 601-605, 611.<sup>1</sup>

For further statement of the facts of the case, see *United States v. Lanier*, 33 F.3d 639, 646-50 (6th Cir. 1994) (three judge panel affirming convictions).

Lanier appealed his convictions. A three judge panel of the Sixth Circuit affirmed. *United States v. Lanier*, 33 F.3d 646 (6th Cir. 1994). On rehearing *en banc*, the Sixth Circuit, in a divided opinion, reversed, dismissing the indictment for legal insufficiency. *United States v. Lanier*, 73 F.3d 1380 (6th Cir. 1996) (Merritt, J.) The United States petitioned for certiorari. This Court granted the writ.

## SUMMARY OF ARGUMENT

The Sixth Circuit *en banc* ruling, *United States v. Lanier*, 73 F.3d 1380 (6th Cir. 1996) (Merritt, J.), erred in reversing the judgment of conviction and dismissing the indictments of

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1. The women's trial testimony contained much evidence of unwanted verbal sexual conduct, in the course of, and separate from, the physical attacks. See e.g. Tr. Vol. II at 221-223, 258 (repeated verbal sexual innuendo directed at Sandy Attaway by defendant); Tr. Vol. IV at 712 (Lisa Couch: "He said that this time he wanted me to suck his dick."); Tr. Vol. IV at 603-604 (Ruby Sipes, quoting defendant as he masturbated in front of her: "Come on, go down on me, make me feel good, touch it...put your mouth on it...")

Judge Lanier for lack of a body of federal authority prohibiting his acts. Lanier's victims, in being sexually assaulted by him, were deprived of two federally protected rights: equality as well as the liberty right for which the government argues. On equality grounds, if not on liberty grounds alone, the jury's verdicts of guilt for his crimes against women should be reinstated, vindicating his victims' constitutional and statutory rights to be free of official sex discrimination.

## ARGUMENT

### I. FEDERAL LAW AGAINST SEX DISCRIMINATION GUARANTEES FREEDOM FROM SEXUAL ASSAULT BY PUBLIC OFFICIALS

#### A. Federal Law Supports Criminal Prosecution for Sexual Assault By State Actors Under §242 For Deprivation of Equality as well as Liberty

Title 18 U.S.C. Section 242 criminalizes "willful" deprivation of rights "secured or protected by the Constitution or laws of the United States" under color of law. Originally passed by Congress to enforce the Fourteenth Amendment, *Cong. Globe*, 41st Cong., 2d Sess., pp. 3807-3808, 3881, this provision is the criminal equivalent to 42 U.S.C. §1983. "In origin it was an antidiscrimination measure...." *Screws v. United States*, 325 U.S. 91, 98 (1944).

The United States argues in this case that the due process clause of the Fourteenth Amendment contains a recognized liberty right to bodily integrity not to be sexually assaulted by state actors while they are performing official duties. Substantial authority supports this argument. *Stoneking v. Bradford Area School District*, 882 F.2d 720, 727 (1989) (due process right to be free from sexual assault in teacher's sexual molestation of student, citing *Ingraham v. Wright*, 430 U.S. 651

(1977) (unjustified intrusions on personal security violate due process liberty)); *Doe v. Taylor Independent School District*, 15 F.3d 443 (5th Cir.), *cert. denied* 115 S.Ct. 70 (1994) (teacher's sexual abuse of student violates student's due process right to bodily integrity); *U.S. v. Contreras*, 950 F.2d 232, 235-236 (5th Cir. 1991) (§242 conviction of policeman for sexual assault of woman in detention); *U.S. v. Davila*, 704 F.2d 749 (5th Cir. 1983) (§242 conviction of border patrol officers for coercing sex from two women they detained). See also *Dang Vang v. Vang Xiong X. Toyed*, 944 F.2d 476 (9th Cir. 1991) (assuming existence of clearly established fundamental right not to be raped by state employee), *cert. denied*, 504 U.S. 941 (1992). Judge Daughtrey's opinion dissenting from the Sixth Circuit reversal *en banc* powerfully marshals this authority. *United States v. Lanier*, 73 F.3d 1380, 1403-1414 (6th Cir. 1996). Amici agree with the government's argument and with Judge Daughtrey's opinion.

The liberty interest asserted arises under the "substantive due process" component of the due process clause of the Fourteenth Amendment. Its assertion by victims comports with the constitutional due process rights of criminal defendants, avoiding invalidation for vagueness when the violation is "willful," *Screws v. United States*, 325 U.S. at 101, that is, when the accused purposefully violates a right "made specific," 325 U.S. at 104, under federal law. As this Court stated in *Screws*, §242 is saved from vagueness when violations are shown to be intentional. The specific intent required for criminal culpability under §242 is "an intent to deprive a person of a right which has been *made specific* either by the express terms of the Constitution or laws of the United States or by decisions interpreting them." 325 U.S. at 104 (emphasis added).

In addition to providing for the liberty of citizens, federal law incontestably provides for their equality, including through recognizing a right to be free from official sex discrimination

in public employment and in the application of law. See, e.g., *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256 (1979) (intentional sex discrimination in public employment violates Equal Protection); *Reed v. Reed*, 404 U.S. 71 (1971) (use of sex as statutory preference in estate administration violates Equal Protection); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (use of gender to strike jurors violates Equal Protection). Women may not be treated less favorably than men by the state because they are women. "Since *Reed*, the Court has repeatedly recognized that neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature..." *United States v. Virginia*, 116 S.Ct. 2264, 2275 (1996) (Ginsburg, J., for the Court).

Since the mid-1970s, as documented at IB below, sex equality law has squarely recognized that to be sexually assaulted by state actors denies women the stature of full citizenship on the basis of sex. It has done this by recognizing the equality right to be free of sex-based sexual assault wherever the Equal Protection clause of the Fourteenth Amendment and/or Title VII of the Civil Rights Act of 1964 apply. As decision after decision interpreting these provisions makes clear, the sexual assaults for which defendant was prosecuted in this case are clearly encompassed within the terms of the federal prohibition against sex discrimination.

The Equal Protection clause of the Fourteenth Amendment is "the Constitution" and Title VII is one of the "laws of the United States" that the plain language of §242 protects from violation with criminal sanctions.<sup>2</sup> However, not every

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2. The Sixth Circuit (*en banc*) opinion is thus mistaken when it limits §242 as "tied by its language simply to 'constitutional rights.'" 73 F.3d at 1383. None of the rights asserted by victims of Lanier are otherwise protected under Title VII alone, so this case thus does not  
(continued...)

violation of the unquestionably established equality right to be free from sexual aggression by government agents supports a criminal prosecution under §242. Not every civil violation of §1983 gives rise to a criminal violation of §242, but it does provide a source for defining those crimes. *United States v. Reese*, 2 F.3d 870, 884 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 928 (1994) ("There is...nothing wrong with looking to a civil case brought under 42 U.S.C. §1983 for guidance as to the nature of the constitutional right whose alleged violation has been made the basis of a section 242 charge."); accord, *United States v. Cobb*, 905 F.2d 784, 788 n. 6 (4th Cir. 1990); *United States v. Bigham*, 812 F.2d 943, 948 (5th Cir. 1987).

Amici submit that where an official defendant acts "willfully," in the *Screws* sense of purposefully violating the right of others to be free from sex-based sexual assault, when that right has been "made specific" in the *Screws* sense of being definitively illegal under federal law at the time the acts were committed, he may be prosecuted under §242 for acts committed under color of his official authority.<sup>3</sup> In the case at bar, all these conditions are met, as set forth more fully below. Where, as here, the charged acts are in addition violent, aggressive, and incorrigible, there can be no question that a criminal prosecution is constitutionally proper.

All of the acts for which David Lanier was indicted clearly violated federal sex equality law when he committed them. He therefore acted "willfully" within §242's statutory meaning of the term. There is thus nothing constitutionally vague or uncertain in the application of §242 to sanction his

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<sup>2</sup>(...continued)

pose the question whether a right solely created by federal statute, not also a right directly protected by the Constitution, can give rise to criminal liability under §242.

3. Amici agree with the patently correct argument of the United States that Judge Lanier is a state actor.

behavior. Congress made no exception for the federal law of sex discrimination when it empowered the United States under §242 to prosecute for crimes of inequality. No authority or principle supports the exception to the well-entrenched *Screws* methodology newly crafted by the Sixth Circuit (*en banc*) majority opinion below for women victims of equality violations and for assaults that are sexual.

**B. Freedom from Sex-Based Sexual Assault by State Actors Has Been Amply "Made Specific" Under Federal Law.**

This Court stated in *Screws*, 325 U.S. at 105:

...[Willful] violators of constitutional requirements, which have been defined, certainly are in no position to say that they had no adequate advance notice that they would be visited with punishment. When they act willfully in the sense in which we use the word, they act in open defiance or in reckless disregard of a constitutional requirement which has been made specific and definite. When they are convicted for so acting, they are not punished for violating an unknowable something.

The terms of this analysis of constitutional requirements apply equally well to "laws of the United States" for purposes of Section 242. Lanier's violations of relevant constitutional and statutory law as interpreted were willful in every respect laid out in this passage. Lanier was not "punished for violating an unknowable something." *Id.*

As an initial matter, Judge Lanier testified at trial that he well knew that the acts with which he was charged were wrong and illegal acts. Tr. Vol. IX at 1572. A fair reading of his testimony supports the inference that he also knew that the assaults with which he was charged were illegal under the

Constitution he was sworn to uphold. Tr. Vol. IX at 1569, 1572.<sup>4</sup> None of what he was charged with was vague to him. To adapt what Justice Murphy said of murder in *Screws*, amici submit that "There is nothing vague or indefinite in...this most basic of all human rights. Knowledge of a

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4. Tr. Vol. IX at 1569:

Q: Well, you understand for example, Judge, that everybody in this country has the right to be free from sexual assault and abuse, you understand that, don't you?

A: Yes, sir, I understand that.

Q: And by everybody, that means women as well as men. You understand that, don't you?

A: Yes, sir.

Q: And you understand that nobody can violate that person's right to freedom of sexual abuse, you understand that, don't you?

A: Yes, sir.

Tr. Vol. IX at 1572:

Q: And you again, in 1990, solemnly swore that you would uphold the laws of the State of the Tennessee and of the Constitution of the United States, isn't that correct?

A: Yes, sir.

Q: And that you wouldn't violate those laws, you would uphold them. You would enforce them fairly. You won't use them for bad purpose, isn't that correct?

A: That's correct.

Q: And I'm sure you would agree, Judge, that it would be a violation of your oath and it would be just plain wrong to take advantage of your power and your position as a judge to assault people who are under your authority and control, wouldn't you agree with that statement?

A: I would agree if I assaulted anybody, it would be a violation of the law.

Q: All right. Well, I know that you deny the assaults, but I think we need to establish that you agree that that would be wrong if it had happened.

A: Yes, sir.

Q: And there is no question about that in your mind, is there?

A: No, sir.

comprehensive law library is unnecessary for officers of the law to know that the right to [sexually assault] individuals in the course of their duties is unrecognized in this nation." 325 U.S. 91, 136-137 (Murphy, J. dissenting).

#### 1. Federal Sex Equality Law Has Increasingly Prohibited Acts of Sexual Aggression Since 1976.

Judge Lanier was clearly on notice, in specific and definite terms, that the acts of sexual aggression with which he was charged violated federal equality law. Each kind of sexual incursion for which Judge Lanier was indicted had been definitively and repeatedly held actionable under a huge body of federal sex discrimination law, as of the date on which he committed the indicted acts. The Sixth Circuit *en banc* majority was simply wrong when it held his violations "previously unknown, undeclared and undefined." *United States v. Lanier*, 73 F.3d 1380, 1394 (1996).

Two years before Lanier's first indicted act was committed, this Court ruled that acts including rape and indecent exposure by a workplace supervisor stated a claim for violation of the federal law against sex discrimination in employment. *Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57, 60 (1986) (sexual harassment as violation of Title VII). In April, 1980, eight years before the first act for which Lanier was indicted, the federal Equal Employment Opportunity Commission's *Guidelines on Discrimination Because of Sex* proscribed "Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" at work as sexual harassment, hence sex discrimination, under Title VII. 29 C.F.R. §1604.11(a) (Apr. 11, 1980). These sources of federal law are hardly obscure.

Since the mid-1970s, sexual aggression in the workplace has been found to state a claim for sex discrimination under federal statutory law that applies to public employment. *Williams v. Saxbe*, 413 F. Supp. 654 (D.D.C. 1976) (Richey, J.)

(unwanted sexual advances first found actionable as sex discrimination under Title VII; case against public employer); *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977) (Robinson, J.) (same by Court of Appeals). The same kinds of sexual aggression by state actors had been widely recognized to violate the Equal Protection Clause of the Constitution. Rulings so holding prior to Lanier's charged acts included *Bohen v. City of East Chicago*, 799 F.2d 1180, 1185 (7th Cir. 1986), *Gobla v. Crestwood School District*, 609 F. Supp. 972, 978-79 (M.D. Pa. 1985), *Estate of Scott v. deLeon*, 603 F. Supp. 1328, 1332 (E.D. Mich. 1985) ("I have little difficulty concluding...that it was clearly established that sexual harassment could violate the rights protected by the equal protection clause") and *Woerner v. Brzeznek*, 519 F. Supp. 517, 519-20 (N.D. Ill. 1981).

Violations of the Equal Protection Clause have long been held capable of supporting §242 prosecutions. *Lynch v. United States*, 189 F.2d 476 (5th Cir., 1951), cert. denied, 342 U.S. 831 (1951). In *U.S. v. Guest*, construing statutory language identical to §242 under the companion conspiracy statute, 42 U.S.C. §241, this Court held that criminal prosecutions for Equal Protection clause violations were permitted. In holding that §241 was not limited to assertions of conspiracy to violate Fourteenth Amendment due process rights, but encompassed violations of the Equal Protection Clause as well, this Court saw no reason to conclude that §241 "protects rights secured by the one Clause [of the Fourteenth Amendment] but not those secured by the other." *U.S. v. Guest*, 383 U.S. 745, 753 (1965). The same logic applies to the identical language of §242. As this Court said in *Guest*, "We have made clear in *Price* that when §241 speaks of 'any right or privilege secured...by the Constitution or laws of the United States,' it means precisely that." Where the public duty involved is providing process, as in custodial situations, the use of force violates the federal right to due process. *U.S. v. Price*, 383 U.S. 787, 793 (1965). Where the public duty involved is

providing a discrimination-free workplace or equal adjudication of the laws, the use of sexual force instead violates the federal right to equality. If criminal defendants have a right not to be beaten instead of tried, civil litigants surely have a right not to be raped or subjected to indecent exposure in adjudicating their claims.

By 1982, seven years before Judge Lanier molested Sandra Sanders, this federal equality right had become so obvious that a standing trustee in Bankruptcy Court, whose compulsive sexual predations strikingly parallel Judge Lanier's, could be removed on the ground that cases under Title VII "indicate a strong Federal policy against women employees being forced to endure offensive and unwelcome sexual advances by their supervisor or employer." *In the Matter of Chapter 13, Pending and Future Cases*, 19 B.R. 713, 717 33 FEP Cases 1871 (U.S. Bankruptcy Court, W.D. Wash. 1982). This trustee was not even an "employer" within Title VII as Judge Lanier unquestionably was.

By 1988, the year Lanier committed the first assault for which he was indicted, the state of women's federally protected equality rights was so obvious, so taken for granted, that Judge Boggs of the Sixth Circuit could remark in passing that "the mere fact that [a state employee's] Title VII rights to be free from "hostile environment" sexual harassment were clearly established at the time of the challenged conduct" did not defeat a qualified immunity claim. *Poe v. Haydon*, 853 F.2d 418, 429 (6th Cir. 1988). The Sixth Circuit panel handed down this decision only sixteen days after Judge Lanier was said to have sexually molested Patty Wallace on her job by fondling her crotch surreptitiously for an hour and a half in court, creating a sexually hostile working environment if ever there was one. Such allegations were prosecutable beyond cavil under §242 as "willful" violations of a recognized federally protected equality right.

## 2. Forced Sexual Intercourse and Other Physical Sexual Assault Was Clearly Prohibited By the Federal Law of Sex Discrimination As Of September 1990.

When David Lanier raped amicus Vivian Archie in September 1990, over fifty reported cases of sex discrimination in the federal courts had been brought on facts of forced sexual intercourse or other unwanted physical sexual contact under federal law. At the time of that assault, fifteen cases in U.S. Courts of Appeal had been reported in which alleged sexual *assault* -- forcible sexual intercourse or sexual assault with physical touching or both -- grounded actions under federal sex equality law.<sup>5</sup> Six were brought against state actors like Lanier under both 42 U.S.C. §1983 and Title VII, thus had constitutional as well as statutory dimension. *Carrero v. New York City Housing Authority*, 890 F.2d 569 (2nd Cir. 1989); *Bohen v. City of East Chicago*, 799 F.2d 1180 (7th Cir. 1986); *Staton v. Maries County*, 868 F.2d 996 (8th Cir. 1989) (previously *Moylan v. Maries County*, 792 F.2d 746 (8th Cir. 1986) (same facts as *Staton* but proceeding only under §1983)); *Starrett v. Wadley*, 876 F.2d 808 (10th Cir. 1989); *Volk v. Coler*, 845 F.2d 1422 (7th Cir. 1988) (also under 1985(3)); *King v. Board of Regents of the University of Wisconsin*, 898 F.2d 533 (7th Cir. 1990). One case, *Poe v. Haydon*, 853 F.2d 418 (6th Cir. 1988), brought under §1983 only, was adjudicated by the Sixth Circuit. One decision stands alone as an exception. *Arnold v. United States*, 816 F.2d 1306, 1310-11 (9th Cir. 1987) (dismissing allegations that appear to include sexual assault for legal insufficiency).

The balance of the sex equality cases grounded on sexual assault reported by Courts of Appeals as of the date of Lanier's first attack on Vivian Archie were brought under

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5. Some cases, like *Spencer v. General Electric*, produced more than one decision. Only one is counted and the most on point is cited.

Title VII. *Spencer v. General Electric Co.*, 894 F.2d 651 (4th Cir. 1990) (rape); *Paroline v. Unisys Corp.*, 879 F.2d 100 (4th Cir. 1989); *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463 (7th Cir. 1990) (woman picked up, set down, her face forced against male defendant's crotch); *Perkins v. General Electric*, 911 F.2d 22 (8th Cir. 1990) (rape); *Gilardi v. Schroeder*, 833 F.2d 1226 (7th Cir. 1987) (sex forced by drugging); *Swentek v. USAir, Inc.*, 830 F.2d 552 (4th Cir. 1987); *McKinney v. Dole*, 765 F.2d 1129 (D.C. Cir. 1985) (defendant rubbed up against plaintiff, grabbed her arm and twisted it); *Phillips v. Smalley Maintenance Services, Inc.*, 711 F.2d 1524 (11th Cir. 1983).

As of the first rape of Vivian Archie, thirty seven additional decisions had been reported by the federal district courts adjudicating claims for forced sex acts under federal sex equality provisions. State actors were sued for both constitutional and statutory sex equality violations in two of them, *Russell v. Moore*, 714 F.Supp. 883 (M.D.Tenn. 1989), and *Vermett v. Hough*, 606 F.Supp. 732 (W.D.Mich. 1984), and under §1983 alone in three more, *Wedgeworth v. Harris*, 592 F.Supp. 155 (W.D. Wisconsin 1984), *Skadegaard v. Farrell*, 578 F.Supp. 1209 (D.C.N.J. 1984), and *Murphy v. Chicago Transit Authority*, 638 F.Supp. 464 (N.D. Ill. 1986). In *Wedgeworth*, the district court reflected the well-established and totally uncontroversial nature of the right being asserted in stating that the court "entertains no doubt that an on-duty police officer who uses his position to exert pressure on an unwilling victim so as to force her into sexual intercourse has violated that person's constitutional rights under color of State law." 592 F. Supp. at 159. Surely a judge is not permitted to commit in his chambers a kind of assault on a civil litigant that a police officer is prohibited from committing against a criminal suspect.

The remainder of the federal district court cases are civil suits for sexual assault as sex discrimination, several against

public actors, under Title VII.<sup>6</sup> The fact that Judge Lanier

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6. *Kouri v. Todd*, 743 F.Supp. 448 (E.D. Virginia 1990) (assault and battery); *Boyd v. James S. Hayes Living Health Care Agency, Inc.*, 671 F.Supp. 1155 (W.D. Tenn. 1987) (put hands on woman); *Robson v. Eva's Super Market, Inc.*, 538 F. Supp. 857 (N.D. Ohio 1982); *Rauh v. Coyne*, 744 F.Supp. 1186 (D.D.C. 1990) (man rubbed his 'organ' against woman); *McLaughlin v. State of N.Y., Governor's Office of Employee Relations*, 739 F.Supp. 97 (N.D.N.Y. 1990) (physical and verbal harassment); *Wangler v. Hawaiian Elec. Co., Inc.*, 742 F.Supp. 1458 (D. Hawaii 1990) (assault and battery); *Walker v. Anderson Elec. Connectors*, 736 F.Supp. 253 (N.D. Ala. 1990) (assault and battery); *Caleshu v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 737 F.Supp. 1070 (E.D.Mo. 1990) (kissed plaintiff, touched her thigh); *Hunter v. Countryside Ass'n for the Handicapped, Inc.*, 723 F.Supp. 1277 (N.D. Ill. 1989) (rape); *Beesley v. Hartford Fire Ins. Co.*, 723 F.Supp. 635 (N.D. Ala. 1989) (assault and battery); *Watts v. New York City Police Dept.*, 724 F.Supp. 99 (S.D.N.Y. 1989) (grabbed breast); *Maturo v. National Graphics, Inc.*, 722 F. Supp. 916 (D.Conn. 1989); *Valerio v. Dahlberg*, 716 F.Supp. 1031 (S.D. Ohio 1988) (assault and battery); *Martin v. Merriday*, 706 F.Supp. 42 (N.D.Ga. 1989) (touching); *Stacy v. Hilton Head Seafood Co.*, 688 F.Supp. 599 (S.D.Ga. 1988) (assault and battery); *Valdez v. Church's Fried Chicken, Inc.*, 683 F.Supp. 596 (W.D. Texas 1988); *Llewellyn v. Celanese Corp.*, 693 F.Supp. 369 (W.D.N.C. 1988); *Lapinad v. Pacific Oldsmobile-GMC, Inc.*, 679 F.Supp. 991 (D.Hawaii 1988); *Doe v. Hallock*, 119 F.R.D. 640 (S.D.Miss. 1987) (battery); *Saulsberry v. Atlantic Richfield Co.*, 673 F.Supp. 811 (N.D.Miss. 1987) (assault); *O'Brien v. King World Productions, Inc.*, 669 F.Supp. 639 (S.D.N.Y. 1987); *Holden v. Burlington Northern, Inc.*, 665 F.Supp. 1398 (D.Minn. 1987); *Ross v. Double Diamond, Inc.*, 672 F.Supp. 261 (N.D.Tex 1987); *Lake v. Baker*, 662 F.Supp. 392 (D.D.C. 1987); *Ullmann v. Olwine, Connelly, Chase, O'Donnell & Weyher*, 123 F.R.D. 237 (S.D. Ohio 1987); *Kritil v. Port East Transfer, Inc.*, 661 F.Supp. 66 (D.Md. 1986); *Priest v. Rotary*, 634 F.Supp. 571 (N.D.Cal 1986) (assault); *Scott v. Sears, Roebuck and Co.*, 605 F.Supp. 1047 (N.D.Ill., 1985); *Pryor v. U.S. Gypsum Co.*, 585 F.Supp. 311 (W.D.Mo. 1984); *Curtis v. Continental Illinois Nat. Bank*, 568 F.Supp. 740 (N.D.Ill 1983); *Stewart v. Thomas*, 538 F.Supp. 891 (D.D.C. 1982); *Guyette v. Stauffer Chemical Co.*, 518 F.Supp. 521 (D.C.N.J. 1981). *Perkins v. General Motors, Inc.*, 709 F. Supp. 1487 (W.D. Mo., 1989) (Court of Appeals decision sustaining is listed

(continued...)

can be civilly sued for what he did hardly means that he cannot also be criminally prosecuted. Indeed, while the civil actionability of sex equality violations does not alone ensure their criminality, it supports rather than undermines the case for it, as argued *supra*. And surely Judge Lanier and the Sixth Circuit are not taking the position that public actors should have more latitude in sexually assaulting women in the course of their work than private actors have.

Two of the federal district court cases noted above were reported in Tennessee prior to August 1989, when Judge Lanier molested Sandra Sanders, the first act in time for which he was convicted by the jury. One, *Boyd v. James S. Hayes Living Health Care Agency, Inc.*, 671 F. Supp. 1155 (W.D. Tenn 1987) -- involving a suit for one weekend of sexual harassment of one woman off the job site through acts that fell far short of Lanier's stalking and contact harms -- made indelibly clear that the kind of aggravated behavior he engaged in unquestionably violated federal sex discrimination law. Six of the district court cases reported prior to the commission of any of Lanier's indicted acts were adjudicated in states located within the Sixth Circuit. Judge Lanier was amply on notice that his sexual predations violated the federal law of equality, possessing no arguable "lack of warning or knowledge that the act which he does is a violation of law." *Screws v. United States*, 325 U.S. 91, 102 (1944).

To the present, the direction of federal law is unanimous and unmistakable: sexual assault in settings otherwise reachable under federal law states a claim for sex discrimination. See, e.g., *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992) (compensatory damages available under Title IX for sex discrimination by teacher in sexually harassing student

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<sup>6</sup>(...continued)

above) stands out as one of the few in which sex alleged to be forced was found to be consensual.

through sexually-oriented conversations, forcible kissing and "coercive intercourse"). From the date of the first assault on Vivian Archie to the present -- during which time Judge Lanier raped Vivian Archie a second time and sexually attacked Sandy Attaway -- amici find approximately one hundred twenty five more cases of alleged sexual assaults litigated in the federal courts under federal sex equality provisions.<sup>7</sup>

### 3. Unwanted Sexual Touching Has Been Increasingly Prohibited By Federal Equality Law Since the Mid-1970s.

Federal cases based on unwanted physical sexual contact short of rape or other sexual assault -- like the sexual pawing and groping of Sandra Sanders and Patty Mahoney and the alleged molestation of Patty Wallace -- account for sixteen additional sex discrimination cases prior to September 1990 and over sixty more federal sex discrimination cases between that date and the present, by amici's analysis.

As to these acts, Judge Lanier had "fair warning that his conduct is within" the prohibition of §242. *Screws v. United States*, 325 U.S. at 104. He was "under no necessity of guessing whether the statute applies to him [citation omitted] for he either knows or acts in reckless disregard of its

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7. These cases arose only in the employment context, but this recognition of actionability was not, at the time employment, see, e.g., *Greiger v. Sheets*, 689 F.Supp. 835 (N.D. Ill., 1988) (permitting claim for sexual harassment in housing under federal Fair Housing Act sex discrimination prohibition); *Abrams v. Merlino*, 694 F.Supp. 1101 (S.D.N.Y., 1988) (sexual harassment in real estate brokerage and sales services actionable under federal sex equality law), as the Sixth Circuit was well aware. *Shellhammer v. Lewallen*, 770 F.2d 167 (6th Cir., 1985) (sexual harassment in federal housing actionable under Title VIII, hostile environment if sufficiently severe, quid pro quo if sexual favors sought in exchange for benefit). This direction has also continued. See, e.g., *Honce v. Vigil*, 1 F.3d 1085 (10th Cir., 1993).

prohibition of the deprivation of a defined constitutional or other federal right." *Id.* In its *en banc* ruling to the contrary, the Sixth Circuit was clearly mistaken.

#### 4. Indecent Exposure and Public Masturbation Is Increasingly Recognized as a Violation of Federal Sex Equality Law.

Ruby Sipes charged that in February or March of 1991, David Lanier willfully exposed his genitals to her in his chambers when she went to discuss her case. Before sending the case to the jury, the trial judge dismissed this count (Count 9), ruling that there is "no uniformly accepted body of federal law that holds that one has a constitutional right not to be exposed to the sexual genitals of another." Tr. Vol. X at 1737.

On the contrary, drawing on federal statutory law as §242 permits, acts of indecent exposure and public masturbation in employment, in a context of other unwanted sexually aggressive acts, were firmly recognized as acts of sex discrimination as of the date (analyzed as of February 1, 1991) that Lanier offended against Ruby Sipes. *Meritor Savings Bank FSB v. Vinson*, *supra* at 60 ("...exposed himself to her..."); *Hall v. Gus Construction Co., Inc.*, 842 F.2d 1010, 1012 (8th Cir., 1988) ("One crew member exposed himself to Ms. Hall."); *Swentek v. USAIR, Inc.*, 830 F.2d 552, 554 (4th Cir. 1987) ("...exposed himself to her by dropping his trousers."); *McKinney v. Dole*, 765 F. 2d 1129, 1132 (D.C. Cir. 1985) ("exposed himself"); *Sims v. Montgomery County Com'n.*, 766 F. Supp. 1052, 1072 (M.D. Ala 1990) ("...a male officer intentionally left a bathroom door open so as to expose himself to a female officer."); *Caleshu v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 737 F. Supp. 1070, 1077 (E.D. Mo. 1990) ("...exposed his genitals in her presence."); *Bailey v. Unocal Corp.*, 700 F. Supp. 396, 397 (N.D. Ill. 1988) ("supervisor had exposed himself to her"); *Valdez v. Church's Fried Chicken, Inc.*, 683 F. Supp. 596, 605 (W.D. Tex. 1988) ("...pulled her pants down in the restroom

and exposed his genitals to her..."); *Llewellyn v. Celanese Corp.*, 693 F. Supp. 369, 373 (W.D.N.C. 1988) ("She then saw Gene Krampf, standing naked near the doorway, intentionally exposing his genitals to her."); *Priest v. Rotary*, 634 F. Supp. 571, 574 (N.D. Cal. 1986) ("exposed his genitals"); *Zabkowicz v. West Bend Co.*, 589 F. Supp. 780, 782 (E.D. Wis. 1984) ("...exposed his buttocks to Mrs. Zabkowicz between 10 and 20 times"); *Weinsheimer v. Rockwell International Corp.*, 754 F. Supp. 1559, 1566 (M.D. Fla. 1990) ("...the alleged incident involving indecent exposure, whose gravity the Court does not minimize..."). See also *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991) (pattern of pictures at work of naked women with sexual body parts exposed constitutes sexual harassment under Title VII). An equality approach to the injuries at bar suggests that the trial judge erred in law in keeping Count 9 from the jury, supporting remand for a new trial on this count.<sup>8</sup>

Since Lanier's harassment of Ruby Sipes, the federal sex equality prohibition on indecent exposure at work has become stronger still. This development is reflected in Judge Richard Posner's unhesitating placement of indecent exposure in the pantheon of per se sexual harassment at work, along with sexual assaults, other unconsensual physical sexual contact, and pornographic pictures. *Baskerville v. Culligan International Company*, 50 F.3d 428, 430 (7th Cir. 1995) (citing *Meritor Savings Bank FSB v. Vinson*, *supra*, *Harris v. Forklift Systems, Inc.*, 114 S. Ct. 367 (1993), and *Carr v. Allison Gas Turbine Division*, 32 F.3d 1007 (7th Cir. 1994)). See also, *Van Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708 (2d Cir. 1996); *Fleenor v. Hewitt Soap Co.*, 81 F.3d 48 (6th Cir. 1996); *Kotcher v. Rosa and Sullivan Appliance Center, Inc.*, 957 F.2d 59 (2d Cir. 1992) (defendant "often pretended to masturbate and ejaculate at" plaintiff, 957 F.2d at 61, behavior found

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8. The government did not appeal the dismissal of Count 9.

"certainly one type of egregious conduct that Title VII was enacted to correct." 957 F.2d at 62-63).

Amici are aware of an additional twenty federal district court cases reported from the date of the harassment of Ruby Sipes to the present in which complaints of sexual harassment as sex discrimination include allegations of indecent exposure or public masturbation, bringing such violations, usually combined with other actionable acts, increasingly firmly within the scope of potential §242 prosecutions. This body of law let David Lanier know, if he did not know already, that just as he was not free to copulate with women by force or grab their breasts at will in the course of his work as Chancellor of Dyer County, he was not free to expose his penis to women who came to his chambers on business.

*Screws* established that "once a due process right has been defined and made specific by court decisions, the right is encompassed by §242." *United States v. Hayes*, 589 F.2d 811, 820 (5th Cir., 1979), *cert. denied*, 444 U.S. 847 (1979). The same is true for the other clause of the Fourteenth Amendment, the Equal Protection Clause. Civil rights expand as formerly excluded groups articulate their injuries in law. Section 242 was written so as to embody the products of that expansion. Justice Rutledge concurring in *Screws* envisioned this explicitly: "[T]here is a body of well-established, clear-cut fundamental rights, including many secured by the Fourteenth Amendment, to all of which the sections may and do apply, without specific enumeration and without creating hazards of uncertainty for conduct or defense. *Others will enter that category*." 325 U.S. at 131 (Opinion of Rutledge, J.) (emphasis added); *United States v. Lanier*, 73 F.3d 1380, 1413-1414 (Daughtrey, J., dissenting, joined by Nelson, Jones, Keith, and Moore, JJ.) (sources for §242 open-ended by design). Civil rights have expanded as envisioned. If all the sexual offenses for which Lanier was indicted are taken together, several hundred cases in the federal courts have considered acts like

them to be illegal under federal equality law. When he did them, they were clear crimes that can be prosecuted without hazard under §242.

## II. EQUALITY LAW PROVIDES A STRONGER PREDICATE THAN DOES SUBSTANTIVE DUE PROCESS FOR §242 PROSECUTIONS FOR SEXUAL ASSAULT.

Substantive due process has a disreputable past, a mixed present, and a cloudy future. The doctrine probably originated in Justice Taney's passing reference in the *Dred Scott* case to slaveholders, deprived of their human property by an act of Congress, as denied due process of law under the Fourteenth Amendment. *Scott v. Sanford*, 60 U.S. (19 How.) 393, 450 (1857). D. Currie, *The Constitution in the Supreme Court*, 271 (1985); J. Ely, *Democracy and Distrust: A Theory of Judicial Review*, 16 (1980); R. Bork, *The Tempting of America*, 31 (1990). Its consequence was to deny Dred Scott his United States citizenship and human status. Not long after, substantive due process invalidated progressive labor legislation on grounds that maximum hours laws violated liberty of contract. *Lochner v. New York*, 198 U.S. 45 (1905). This history of the doctrine as a tool to entrench race and class inequality does not bode well.

In our time, substantive due process has generated important civil liberties, *Griswold v. Connecticut*, 381 U.S. 479 (1965) (the right to privacy), and rights for women, *Roe v. Wade*, 410 U.S. 113 (1973) (decriminalizing abortion). It has also been criticized from a range of perspectives,<sup>9</sup> the core

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9. Currie, Ely, and Bork, *supra*, are examples. See, A. Cicia, "A Wolf in Sheep's Clothing?: A Critical Analysis of Justice Harlan's Substantive Due Process Formulation," 64 *Fordham L. Rev.* 2241 (1996); L. Tribe and M. Dorf, "Levels of Generality in the Definition of Rights," 57 *U. Chi. L. Rev.* 1057 (1990) (a "somewhat tarnished

(continued...)

of which is that it is dangerous and unprincipled because it can mean anything to anyone, taking its contours (such as they are) from emanations of penumbras and its content from the dominant values of the time, assumed to be the values of others. See, e.g., *Michael H. and Gerald D.*, 491 U.S. 110, 121-127 (1989) (Scalia, J., for the plurality) ("a treacherous field"); *Poe v. Ullman*, 367 U.S. 497, 540-555 (1961) (Harlan, J. dissenting). *Roe* has been criticized for its method, recently upheld largely on stare decisis grounds, *Planned Parenthood of S.E. Pennsylvania v. Casey*, 505 U.S. 833 (1992) (plurality) cf. 979-984, 1000-1001 (Scalia, J., dissenting regarding various alleged penumbras), amid growing recognition that the right *Roe* enunciates is properly a sex equality right sounding in equal protection of the laws. See, e.g., C. Sunstein, *The Partial Constitution*, 270-285 (1993); C. MacKinnon, "Reflections on Sex Equality Under Law," 100 *Yale L. J.* 1281 (1991).

Granting that substantive due process embodies a liberty interest for all citizens to be free of all assault, including sexual assault, by state actors, federal criminal protection from specifically sex-based sexual assault by state actors should be — and already is — founded, in addition and alternatively, on the solid ground of equality law. The federally protected right to be free of sexual assault is already an equality right. This is as it should be. It is *sex equality* that women, the most common victims of sexual assault, lose when they are sexually assaulted by state actors, usually men. The full federal citizenship of which Judge Lanier deprived his victims was taken from them as women workers and women litigants. His power to do this derived from his gender and his position of official authority combined. He used his office to get from them as women what he wanted as a man. When he violated them sexually, he violated them as women. He used

the power of the state he wielded as a judge and a public employer to gain access to women so he could sexually use them as a man, and then he used that same state power to silence them so he could escape the consequences such acts have to men who do not have state power. Men citizens did not have to run a gauntlet of groping and penetration to have access to employment and adjudication by Judge Lanier. The crisp comparative standard of equality law recommends itself over the potential bog of value judgments and morality, such as determining what "shocks the conscience"<sup>10</sup> of substantive due process. Criminal law benefits from such clarity.<sup>11</sup>

The liberty theory of criminality, standing alone, appeared to mislead the Sixth Circuit in the *en banc* oral argument into inapt analogies, such as whether a judge, at the baseball stadium for a Mets game, who angrily beats a ticket scalper, thereby commits a federal crime. Oral Argument (No. 93-5608, June 14, 1995). Suppose instead, in a more appropriate hypothetical suggested by federal equality law, a pro se woman litigant in a case before the Sixth Circuit was summoned to a judge's chambers to discuss the case. The judge rapes her and suggests that her silence will facilitate a legal outcome favorable to her. Many of the complaining witnesses in *Lanier* were presented with that or akin *quid pro quo* situations, such as amicus Archie, who testified Judge Lanier

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10. Judge Daughtrey, defending the application of substantive due process in this case, recognizes potential drawbacks in some instances at 73 F.3d at 1413.

11. It is also sex equality law that refutes defendant's argument that his actions were not constitutional violations because they were merely "personal, private actions." *Brief in Opposition*, 3-4. As a matter of law, this argument was rejected in 1976 in sexual harassment cases. *Barnes v. Costle*, 561 F.2d 983, 990 (D.C. Cir. 1977). Whether or not challenged sexual behavior is personal rather than sex-based remains a question of fact.

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<sup>9</sup>(...continued)  
 banner"). See also J. Mashaw, *Due Process in the Administrative State* (1985).

said, in reference to questions on the custody of her child, "he would help me, for me to help him." Tr. Vol. III at 392. Such a litigant is clearly not treated equally to other litigants. To adapt the language of *Screws*, Vivian Archie had a right for the custody of her child "to be tried by a court rather than by ordeal." 325 U.S. 107. Sexual compliance is no more valid a part of adjudication than beating is a valid part of interrogation. But it is sex equality law -- specifically the definitively established "*quid pro quo*" type of federal sexual harassment law, *Barnes v. Costle*, 561 F.2d 983 (D.C.Cir., 1977); *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64-65 (1986); *Karibian v. Columbia University*, 14 F.3d 773 (2d Cir. 1994); 29 C.F.R. §1604.11(a)(2) (1980) (*quid pro quo* harassment occurs when "submission to or rejection of [unwelcome sexual] conduct by an individual is used as the basis for employment decisions affecting such individual") -- that specifically defines the deprivation of federal rights suffered by women who are sexually attacked by men in government exercising their power of office.

### III. THIS COURT CAN VINDICATE WOMEN'S FEDERAL EQUALITY RIGHTS IN THIS PROCEEDING.

Blame for the failure to recognize women's liberty interests in this case rests squarely with the Sixth Circuit majority, but the United States "neither articulated nor proposed the recognition of a gender-based crime for sexual assault involving discrimination against...women in violation of the Equal Protection Clause." 73 F.3d at 1384.<sup>12</sup> This Court

12. Lanier's defense attorney, Wayne Emmons, at trial repeatedly referred to the case in discrimination terms. Emmons' cross-examination of Sandy Sanders attempted to rebut a charge that Lanier retaliated against Sanders for complaining about sexual harassment. Tr. Vol. II at 147-148. He also refers to the government's claim: "to retaliate against her because she rejected his sexual advances." Tr. Vol. (continued...)

can and should rectify this error in law.

Whether or not specific conduct, if proven, violates a clearly defined federal right is a question of law. The Sixth Circuit, exercising plenary review, dismissed Lanier's convictions on the ground that his conduct, as proven, violated no federal right that had been "made specific" under *Screws*. Amici offer an additional or alternate ground in support of the government's position that the federal right Lanier violated under §242 had been "made specific" under *Screws*. It is entirely appropriate for this Court to consider<sup>13</sup>, and

<sup>12</sup>(...continued)

II at 175. Sexual harassment is an equality claim, not a liberty claim, the "*quid pro quo*" form of which is employment consequences for rejection of sexual advances. "Retaliation" states a separate claim for discrimination. Emmons also observes that sexual harassment is "of a similar nature" to the charges on trial. Tr. Vol. IV at 568. One lawyer for the government as much as admits that this is a sexual harassment case at one point, Tr. Vol. IV at 587 (Moskowitz), although this theory is distinguished by the government at other points, e.g. Tr. Vol. I at 57 (Parker). The government's reference in summation to the "right we all have" not to be violated, Tr. Vol. X at 1771 is not specified as a liberty right to the jury. It could as well be equality. Emmons' defense summation, that Lanier is accused of "violating serious civil rights under our constitution," Tr. Vol. X at 1825, could as well. Indeed, the only mention to the jury of the federally protected right explicitly called "liberty" in the trial located by amici (other than in the judge's jury instructions) occurs in Lanier's counsel's concession that sexual assault, excluding indecent exposure, adequately states a constitutional crime. Tr. Vol. VI at 960-961.

13. Amici raise "not a new claim...but a new argument to support" the government's claim that Lanier was constitutionally found guilty of a federal crime, see *Lebron v. National Railroad Passenger Corporation*, 115 S. Ct. 961, 965 (1995). The argument here is thus "fairly comprised" by the question presented under this Court's Rule 23.1(c). *Procunier v. Navarette*, 434 U.S. 555, 559 n.6 (1977) "In any event, [this Court's] power to decide is not limited by the precise terms (continued...)"

to affirm, Lanier's jury convictions on an additional or alternative legal ground, such as the equal protection ground amici advance. Amici are not asking for Lanier to be tried on a new claim, or objecting to a jury instruction that was accepted by the government, see *City of Springfield, Massachusetts v. Kibbe*, 480 U.S. 257, 258 (1966), but reinstating a jury verdict on an additional or alternate theory, for which the proof accepted on the claim that was tried is legally sufficient.

In convicting Lanier for violation of the civil rights of his victims, the government at trial established all the facts needed for his conviction for a crime of inequality. The case as tried, prosecuted as well as defended, amounted to an inequality case, albeit with none of the benefits to the prosecution that an equality theory would have provided. As a result, what was proven met or exceeded the requirements of an equality approach to the criminality of the same indicted acts.

On the counts of which Lanier was convicted, the jury found that the sexual assaults occurred under color of law and were willful. The factual issues on "color of law" are legally identical in the liberty and equality settings. The proof of willfulness made at trial easily supports the requisite showing of motive or intent by state actors who criminally violate sex equality rights. Intent, in sex discrimination law, goes to

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<sup>13</sup>(...continued)

of the question presented." *Procurier at Id.*, citing *Blonder-Tongue Laboratories, Inc. v. University Foundation*, 402 U.S. 313, 320 n. 6 (1971). This Court even has the power, in appropriate circumstances, to consider issues not present in the jurisdictional statement or petition for certiorari and not presented in the Court of Appeals. *Vance v. Terrazas*, 444 U.S. 252, 545 (1980) (collecting cases). See also *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 371 n.4 (1967) (government's "change in theory, in view of the nature and importance of the case," accepted "because the request for the substance of the relief was embraced in the question presented...and because appellees have not been adversely affected.").

whether challenged conduct is sex-based. The evidence at trial of pattern going to "color of law" amply supports a conclusion that Lanier's acts were sex based — as do the acts on their face, the fact of so many victims, and their common gender. See also *Bohen v. City of East Chicago*, 799 F.2d 1180, 1187 (7th Cir. 1986) (in showing intent to discriminate under §1983 in sexual harassment case, "Harassment of the plaintiff alone because of sex is enough.") Each act of which Lanier was convicted was proven unwelcome, as a sex equality theory would require, when the jury found "coercion" on the trial judge's instruction. Tr. Vol. XI at 1901. Because so many of Lanier's indicted actions, proven to be "under color of law," were undertaken in his role as an employer, the case for use of his power over women's jobs to coerce sex "in employment" was also thereby made. For women litigants, the proof that he acted with power over them is no different when he deprives them of their liberty than of their equality. Once the indicted acts are determined criminally actionable as a matter of law, all the anguish over "bodily harm" as an element is eliminated. Excluded pattern and like-kind evidence supporting whether the acts were sex-based would be admitted, supporting the complainants' credibility.<sup>14</sup> Lanier's defense -- "...I have never forced my attention on any of these women

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14. Proceeding on the liberty theory, the trial judge ruled that each woman's account had to be taken in isolation, and they could only be taken together to show intent. Tr. Vol. II at 109-110, 263-264; Vol. VI at 1078. Tr. Vol. XI at 1879-1880 (jury instructions). In the experience of amicus NCASA, such an approach devastates the credibility of women who bring sexual assault charges. Each one can be picked off one at a time based on invidious stereotypes: this woman is a whore (Emmons: She got paid for sex. What does that make her? Tr. Vol. X at 1802), this one a flirt (Lanier: She is a real flirtatious sort of woman. She winks at the men, a real slow and deliberate wink. Tr. Vol. IX at 1561), this one a slut, (Emmons:...blow job queen of Dyer County...Tr. Vol. III at 346), and so on. Lanier's acquittal of the rape of Lisa Couch, to which he said she consented, Tr. Vol. VIII at 1529, was a predictable result.

and never touched any of them in any sexual way against their will." Tr. Vol. IX at 1567 -- is unaffected.

### CONCLUSION

For the reasons stated, the decision of the Court of Appeals for the Sixth Circuit *en banc* should be reversed, defendant's jury convictions reinstated, and a new trial ordered on Count 9.

Respectfully Submitted,

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